CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, and Notices

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

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This issue contains:

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DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

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U.S. Customs Service

Treasury Decisions

19 CFR Parts 4, 24, 111, 122, 123, 145, and 178

(T.D. 93–85)

RIN 1515–AA50

USER FEES FOR CUSTOMS SERVICES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document sets forth final amendments to the Customs Regulations regarding fees for certain Customs services provided for in section 13031 of the Consolidated Omnibus Budget Reconciliation Act of 1985, as amended. The fees, subject to certain limitations, involve arrival fees applicable to commercial vessels, commercial trucks, railroad cars, private vessels and private aircraft, passengers aboard commercial vessels and commercial aircraft, and barges and other bulk carriers from Canada or Mexico, a fee for each item of dutiable mail for which a Customs officer prepares documentation, and an annual fee for each Customs broker permit. This document replaces interim regulations to reflect current statutory requirements and provides additional clarification regarding the circumstances under which the fees must be paid.

EFFECTIVE DATE: November 22, 1993.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

BACKGROUND

Prior to enactment of the Consolidated Omnibus Budget Reconciliation Act of 1985 as discussed below, the Customs Service had only limited statutory authority for the collection of fees or other charges for

services rendered to the public. Such fees or charges applied only in specific contexts, including the following: (1) in connection with pre-clearance of passengers and private aircraft when such services were of special benefit to particular persons; (2) in connection with the operation of Customs bonded warehouses and foreign trade zones; (3) for the entry and clearance of vessels, and the entry and delivery of merchandise carried by vessel, outside the limits of a port of entry; (4) for specific services rendered to vessels under the Customs and navigation laws (navigation fees); (5) for overtime services rendered to carriers during non-business hours; and (6) in connection with services provided at certain small user fee airports. No general legal authority existed for the collection of fees or charges for the broad range of services rendered by Customs in connection with commercial operations. These were borne by the taxpayers rather than the parties receiving the services.

CONSOLIDATED OMNIBUS BUDGET RECONCILIATION ACT OF 1985

In section 13031 of the Consolidated Omnibus Budget Reconciliation Act of 1985 (the COBRA, Public Law 99–272), Congress vested in the Secretary of the Treasury explicit authority to collect fees for providing Customs services in connection with the arrival of certain vessels, vehicles, railroad cars, aircraft, passengers and dutiable mail, and in connection with Customs broker permits. In addition, section 8101 of the Omnibus Budget Reconciliation Act of 1986, Public Law 99–509, amended section 13031 of the COBRA to provide for the assessment of a processing fee on entries of imported merchandise; this aspect of section 13031 of the COBRA is not the subject of this document.

The fees set forth in section 13031 of the COBRA were codified at 19 U.S.C. 58c and, as originally enacted, consisted of the following:

1. For the arrival of a commercial vessel of 100 net tons or more, $397 (the COBRA also defined "vessel" to "not include any ferry");
2. For the arrival of a commercial truck, $5 (the COBRA also provided in this regard that no such fee may be charged for the arrival of a commercial truck during any calendar year after a total of $100 in fees has been paid for the provision of Customs services for all arrivals of that truck during that calendar year);
3. For the arrival of each passenger or freight railroad car, $5 (the COBRA also provided in this regard that no such fee may be charged (a) for certain in-transit railroad cars which are part of a train that originates and terminates in the same country, and (b) as in the case of commercial trucks, once $100 in fees have been paid on the railroad car in the same calendar year);
4. For all arrivals made during a calendar year by a private vessel or private aircraft, $25;
5. For the arrival of each passenger aboard a commercial vessel or commercial aircraft, $5 (the COBRA also provided in this regard that no such fee may be charged in connection with the arrival of any passenger whose journey originated in Canada, in Mexico, in a territory or possession of the United States, or in any adjacent island within the meaning of 8 U.S.C. 1101(b)(5));

6. For each item of dutiable mail for which a document is prepared by a Customs officer, $5; and

7. For each Customs broker permit issued under 19 U.S.C. 1641(c)) and held by an individual, partnership, association, or corporate Customs broker, $125 per year.

INTERIM REGULATIONS

On June 11, 1986, Customs published as T.D. 86–109, 51 F.R. 21152, interim amendments to the Customs Regulations to implement the fee provisions in section 13031 of the COBRA. The fees described in items 1. through 6. above were covered by new section 24.22 (19 CFR 24.22), and the substance of the Customs broker permit fee was covered by new section 111.96(c) (19 CFR 111.96(c)). In addition, appropriate cross-references to the new section 24.22 provisions were inserted (1) in Part 4 (19 CFR Part 4) which concerns vessels in foreign and domestic trades, (2) in Part 6 (19 CFR Part 6) which concerns air commerce regulations and which was subsequently revised and redesignated as Part 122 (19 CFR Part 122), (3) in Part 123 (19 CFR Part 123) which concerns Customs relations with Canada and Mexico, and (4) in Part 145 (19 CFR Part 145) which concerns mail importations. Although these regulatory changes were set forth as interim regulations and went into effect on July 7, 1986, in order to coincide with the effective date of the statutory provisions, the notice invited public comments on the interim regulations which would be considered before adoption of a final rule. The public comment period closed on August 11, 1986.

TAX REFORM ACT OF 1986

Subsequent to the publication of the interim regulations, section 13031 of the COBRA was extensively amended by section 1893 of the Tax Reform Act of 1986 (the Tax Act, Public Law 99–514). The Tax Act amendments having a substantive effect on the interim regulatory provisions were as follows:

1. A new $100 fee was added for the arrival of a barge or other bulk carrier from Canada or Mexico. In addition, for purposes of this fee the Tax Act defined "barge or other bulk carrier" as "any vessel which (A) is not self-propelled, or (B) transports fungible goods that are not packaged in any form."

2. The fee provision for arriving railroad cars was amended to refer to each railroad car "carrying passengers or commercial freight" and the fee was increased to $7.50. Thus, the fee, as increased, would no longer apply to empty railroad cars.

3. With regard to the fee applicable to the arrival of each passenger aboard a commercial vessel or commercial aircraft, a new limitation was added which provided that no such arrival fee may be charged for any passenger "(A) who is in transit to a destination outside the customs territory of the United States, and (B) for whom customs inspectional services are not provided."

4. With regard to the $397 fee applicable to the arrival of a commercial vessel of 100 net tons or more, new limitations were added which provided that no such fee may be charged for the arrival of

(a) a vessel during a calendar year after a total of $5,955 in fees (charged either as the $397 fee or as the $100 fee applicable to a barge or other bulk carrier from Canada or Mexico) has been paid for the provision of Customs services for all arrivals of that vessel during that calendar year, (b) any vessel which, at the time of arrival, is being used solely as a tugboat, or (c) any barge or other bulk carrier from Canada or Mexico.

5. With regard to barges and other bulk carriers, a limitation was added which provided that no fee for the arrival of a barge or other bulk carrier from Canada or Mexico may be charged during a calendar year after a total of $1,500 in fees, charged either under the $397 fee provision applicable to a commercial vessel of 100 net tons or more (for example, when the barge or other bulk carrier did not arrive from Canada or Mexico) or under the $100 fee provision applicable to a barge or other bulk carrier from Canada or Mexico, has been paid for the provision of Customs services for all arrivals of that barge or other bulk carrier during that calendar year.

6. With regard to the fees applicable to commercial trucks, railroad cars, and private vessels, a limitation was added which provided that no such fees may be charged if the commercial truck, railroad car, or private vessel is being transported, at the time of arrival, by any vessel that is not a ferry.

7. The exemption from the arriving passenger fee was expanded to also cover passengers whose journey originated in the United States and was limited to Canada, Mexico, territories and possessions of the United States, and the identified adjacent islands.

8. An exemption from the arrival fees was added to cover "the arrival of any ferry", and the definition of "vessel" (which specifically excluded a ferry) was replaced by a definition of "ferry", *i.e.*, "any vessel which is being used (A) to provide transportation only between places that are no more than 300 miles apart, and (B) to transport only (i) passengers, or (ii) vehicles, or railroad cars, which are being used, or have been used, in transporting passengers or goods."

9. As regards the annual Customs broker permit fee, provisions were added stating that notice of the date on which payment of the fee is due shall be published in the Federal Register at least 60 days before the due date, that a permit may be revoked or suspended for nonpayment of the fee only if such required notice was published, and that a Customs broker license may not be revoked or suspended merely for nonpayment of the permit fee. In addition, the Tax Act provided that the permit fee payable for calendar year 1986 would be $62.50 and that any amount paid in excess of that amount would be refunded by Customs or, at the option of the broker, credited toward the 1987 fee.

CUSTOMS AND TRADE ACT OF 1990

Section 111 of the Customs and Trade Act of 1990 (the 1990 Act, Public Law 101–382) amended the COBRA in two respects which bear on the interim regulatory provisions. The first amendment modified the in-transit railroad car exemption so that its application would be based on the movement (journey) of the car rather than the train (thus, the car,

rather than the arriving train of which it is a part, must originate and terminate in the same country in order for the exemption to apply). The second amendment involved the addition of a new paragraph providing that any fee under the COBRA shall be treated as a Customs duty (1) for purposes of applying the administrative and enforcement provisions of the Customs laws and regulations (including for purposes of computing penalties) except in the case of drawback or where otherwise provided in regulations, and (2) for purposes of determining the jurisdiction of any U.S. court or agency.

ADDITIONAL ADMINISTRATIVE ACTION

Pending analysis of the public comments received on the interim regulations, resolution of certain procedural issues, and anticipated further statutory changes, all of which necessitated a delay in adoption of the interim regulations as a final rule, and except for the changes to the annual broker permit fee provision, Customs implemented the Tax Act changes discussed above by means of directives or other instructions issued to Customs field offices and, through those offices, to the general public. The Tax Act change to the annual broker permit fee provision regarding 60–day advance publication of the due date for the fee was implemented in the Customs Regulations as a final rule on October 31, 1986, in T.D. 86–195, 51 F.R. 39746, which involved in this regard a revision of the text of section 111.96(c) as originally adopted on an interim basis. In addition, the two above changes to the COBRA effected by the 1990 Act were implemented on an interim basis (by revising section 24.22(d)(5) and by adding a new section 24.22(j)) on April 15, 1991, as part of T.D. 91–33, 56 F.R. 15036, the main purpose of which was to set forth new interim regulations implementing various changes that the 1990 Act made to the COBRA merchandise processing fee provisions; the interim regulatory provisions set forth in T.D. 91–33 were adopted as a final rule without change on December 5, 1991, as T.D. 91–95, 56 F.R. 63648.

ANALYSIS OF COMMENTS

Comments were received from members of Congress, Federal and state agencies, municipalities, trade associations, various airline, rail, vessel and commercial trucking concerns, customs brokers, private fliers and boaters, and other members of the general travelling and importing public.

COMMERCIAL VESSELS

Comment:

Numerous commenters stated that the $397 fee set forth in interim section 24.22(b) for the arrival of a commercial vessel of 100 net tons or more is burdensome, that the fee should not be assessed at other than the first port of arrival in the United States, and that a cap should be placed on the fee as it was for other fees. Some of these commenters further suggested that Great Lakes vessels should be exempted from the fee.

Customs response:

The concerns reflected in these comments involve legislative policy issues that Customs cannot address in the regulatory texts where the statutory provisions do not provide a sufficient legal basis to support such regulatory changes. However, to the extent that some of these concerns were subsequently addressed by Congress in the Tax Act amendments discussed above, conforming changes to the interim regulations are appropriate.

The Tax Act provision establishing a per vessel limit of $5,955 in fees for arrivals during a calendar year addresses the comment regarding the need for a fee cap, and section 24.22(b) has been modified as set forth below to reflect this statutory change. However, in order to ensure both collection of required fees and proper application of the calendar year limit, and in recognition of the fact that records of prior individual arrival fee payments are not maintained by Customs so as to be available for verification at each port of entry, the modified regulatory text makes application of the annual statutory limit contingent on submission to Customs of adequate proof of payment to that limit. Such proof of payment of individual arrival fees normally would consist of Customs-certified copies of receipts (Customs Form 368 or 368A) which may be obtained at the time of payment of the individual arrival fee.

In regard to the comment that the fee should be assessed only at the first port of arrival rather than "at each port of arrival" as provided in the interim regulations, the Conference Report relating to the Tax Act, after noting that the fee cap was computed on the basis of fifteen arrivals per year, specifically reflected the conferees' intent that the commercial vessel fee "be applicable to each arrival at a U.S. port regardless of whether these arrivals occur as a series of calls at U.S. ports on the same trip or on several trips." Thus, the interim regulations in this regard are consistent with the statutory language and the legislative history relating thereto. The sentence in interim section 24.22(b) which gave rise to this comment has been redrafted as set forth below to more clearly reflect the Congressional intent.

Although the COBRA, as amended, provides no specific exemption for Great Lakes vessels, the Tax Act addition of the $100 fee and $1,500 annual cap for arrivals of barges or other bulk carriers from Canada has the effect of substantially reducing the fees payable by such bulk carriers over 100 net tons which operate on the Great Lakes.

A new paragraph (2) has been added to section 24.22(b) to set forth the terms of the barge or other bulk carrier fee. In order to ensure that this bulk carrier fee will be applied only in the intended context as reflected in the Tax Act Conference Report *(i.e.,* where such bulk carriers compete with trucks and rail cars arriving by land from Canada or Mexico which are subject to much lower arrival fees), this new paragraph covers only bulk carriers arriving from Canada or Mexico either in ballast *(i.e.,* empty) or transporting only cargo laden in Canada or Mexico; thus, the $397 fee, rather than the lower bulk carrier fee, would apply to a bulk

carrier of 100 net tons or more which arrives transporting any cargo laden in a country other than Canada or Mexico even if the voyage of the carrier includes a stop in Canada or Mexico immediately prior to its arrival in the United States. In addition, consistent with the treatment of the other commercial vessels as discussed above, this new paragraph both provides that the fee applies to each arrival even if a single voyage involves more than one arrival and makes application of the annual fee limit contingent on submission of proof of prior payments during the year.

It should also be noted that the two new fee limitation provisions in paragraph (b) have been drafted in such a way as to give effect to the intent reflected in the statute and the Tax Act Conference Report that, where a vessel is used in the same year both as a bulk carrier to which the $100 fee and $1,500 cap apply and as a vessel to which the $397 fee and $5,955 cap apply, (1) once a total of $5,955 in fees has been paid on the vessel under one or both of the fee categories, no further fee (or portion thereof) would have to be paid during that year when the vessel arrives under circumstances that would normally trigger the $397 fee and (2) once a total of $1,500 in fees has been paid on the vessel under one or both of the fee categories, no further fee (or portion thereof) would have to be paid during that year when the vessel arrives under circumstances that would normally trigger the $100 fee.

Comment:

Several commenters stated that the term "ferry" should be defined broadly for purposes of the statutory exemption from the $397 commercial vessel fee.

Customs response:

Section 24.22(a) as set forth below has been modified to incorporate the definition of a ferry as added by the Tax Act, and Customs has no authority to expand upon this specific statutory definition.

Even though the Tax Act amendments removed the statutory definition of "vessel" as not including any ferry (because the addition of the specific fee exemption for ferries accomplished the same purpose), the broader definition of "vessel" in section 24.22(a) has been retained because it serves to clarify the basic scope of the commercial vessel fees. However, this definition has been amended as set forth below by deleting the words "or any ferry" at the end (to avoid an inconsistency with the definition of a ferry which uses the word "vessel"), and a separate exemption provision covering ferries has been added to section 24.22(b) as set forth below.

Given the specific statutory (and corresponding regulatory) definition of "ferry", which involves the way in which the vessel is being used at the time of its arrival, Customs believes that standard statutory application requires that precedence be given to this definition in determining what arrival fee or fees should be collected. Thus, if a vessel at the time of arrival is being used in a manner consistent with the definition of

a ferry, it will be treated as a ferry for purposes of the COBRA fees, with the result that (1) no arrival fee will be collected on the ferry itself and (2) arrival fees will be payable for each passenger, commercial truck and loaded or partially loaded railroad car being transported by the ferry.

Comment:

Several commenters suggested that tugs and barges should be treated as one unit for purposes of assessing the commercial vessel fee.

Customs response:

This comment is addressed by the Tax Act provision which added an exemption from the fee for any vessel which, at the time of arrival, is being used solely as a tugboat, and section 24.22(b) as set forth below has been amended to reflect this statutory change. It should be noted that, as stated in the Tax Act Conference Report, this exemption applies only when the tugboat is actually propelling a barge or accompanying a vessel (because the barge or vessel would be subject to an arrival fee) and thus does not apply to a tugboat which arrives alone.

Comment:

One commenter suggested that the user fees assessed at ports other than the first port of arrival be secured by a bond.

Customs response:

The suggested procedure would only serve to delay collection of the fee. Moreover, the total fees due for additional port arrivals during the same voyage would have to be collected prior to departure of the vessel for a foreign port, and such a collection procedure would impose an unacceptable recordkeeping burden on Customs. Accordingly, Customs does not believe that this suggestion should be adopted.

Comment:

One commenter suggested that the fee should not be charged on vessels merely taking on bunkers.

Customs response:

Vessels merely taking on bunkers are not required to enter under 19 U.S.C. 1441 and 19 CFR 4.3 and thus under the interim regulations are not subject to the fee. Accordingly, no change to the interim regulations is required in this regard.

Comment:

A commenter suggested that user fees should not be collected on a vessel owned by or under the complete control of the United States.

Customs response:

Customs agrees. Given the specific application of the fee to a "commercial vessel" *(i.e.,* a vessel carrying passengers or goods in trade), a vessel owned or operated by or on behalf of the United States Government or a foreign government normally would not be subject to the fee. In order to clarify this point and also ensure consistency with the regulations covering vessel reporting and entry requirements, section 24.22(b) as set forth below has been modified by adding an exemption

which refers to any government vessel for which no report of arrival or entry is required under section 4.5 of the Customs Regulations (19 CFR 4.5).

COMMERCIAL TRUCKS

Comment:

A number of commenters expressed general opposition to the commercial truck processing fee based on the argument that Customs services are required by law and must be used. These commenters also complained of the resulting administrative burden placed on industries and carriers.

Customs response:

These comments are directed to legislative policy issues reflected in the statute itself. Accordingly, in the absence of a change to the statutory fee structure, Customs has no legal authority to modify the implementing regulations in response to these comments.

Comment:

Some commenters suggested that the 1986 $100 yearly permit fee for commercial trucks be prorated due to its mid-year implementation, similar to the administrative decision set forth in the interim regulations notice prorating the $25 annual fee for private aircraft and vessels to $12.50 for 1986.

Customs response:

Customs determined that it would not be appropriate to prorate the $100 commercial truck prepaid permit fee for 1986 for the following reason: whereas the fee applicable to private aircraft and vessels is an annual or "time period" fee, the basic commercial truck processing fee is set at $5 for each truck entry and thus is a "transaction" fee. Thus, proration due to mid-year implementation was considered inapposite in the context of the $100 commercial truck prepaid permit fee, the function of which is only to provide the option of making a one-time payment reflecting the statutory limit on the total amount of $5 fees payable for one truck during a single year.

Comment:

Several commenters suggested allowing the accumulation of individual $5 payments toward the issuance of a $100 permit.

Customs response:

In order to implement the $100 annual fee cap under the COBRA with the least possible administrative burden on Customs, the interim regulations (1) included a provision allowing prepayment of the $100 prior to the first clearance through Customs in any calendar year and (2) provided that no credit toward the $100 annual fee would be given for $5 individual crossing payments. Support for these regulatory provisions was found in the Conference Report pertaining to the COBRA which stated that the conferees expected Customs "to administer this fee as a one-time fee."

Customs remains of the view that the $100 annual fee cap can and should be administered only on a one-time payment basis rather than also by cumulation of individual arrival fee payments. However, on further consideration Customs believes that there is no compelling reason for limiting the time for making the $100 prepayment (or for affixing the decal to the truck windshield) to either prior to the beginning of the calendar year or prior to the first clearance through Customs in that calendar year.

Accordingly, section 24.22(c) as set forth below has been modified (1) to refer to the $100 annual payment as a fee limitation but only in the context of a prepayment thereof and only if the issued decal has been affixed to the vehicle windshield (the latter representing the only evidence that would be available to Customs at the time of an arrival to show that the $100 annual fee has in fact been paid) and (2) to provide for such prepayment and issuance of the windshield decal at any time during the calendar year so that the exemption from individual arrival fees would apply to either the whole calendar year or any remaining portion thereof.

Comment:

Many commenters questioned the propriety of collecting processing fees on empty trucks, contending that no paperwork is involved and minimal effort is expended by Customs in processing empties. It was also suggested that in-transit trucks should be exempted from the fee.

Customs response:

A commercial truck was defined in the interim regulations as a "self-propelled vehicle designed and used for the transportation of commercial merchandise, or the transportation of non-commercial merchandise on a for-hire basis", and the interim text further stated that the definition included empty trucks and truck cabs without trailers. This definition clarified the intent reflected in the Conference Report pertaining to the COBRA which was to cover "self-propelled vehicles designed and used for the transportation of property." The term "self-propelled vehicle" was used for two reasons. First, in the case of tractor/trailer and similar towing situations, it ensures that the charge will be assessed on the tractor or other towing vehicle and not on the trailer or other vehicle being towed. Second, truck tractors and other towing or pulling vehicles are not the only conveyances charged: any vehicle which can be driven (including a truck tractor arriving without a trailer) is subject to the charge. As the definition implies, the key factor in determining which vehicles will be charged is the actual or intended commercial use of the vehicle. Although the COBRA, as amended by the Tax Act, specifically provides for the assessment of the railroad car fee only on cars that are not empty, the commercial truck fee in the COBRA is not so limited. Similarly, the COBRA, as amended by the 1990 Act, contains an exemption for in-transit railroad cars but provides no such exemption for in-transit trucks. Given the clear Congressional intent reflected in the

different treatment given commercial trucks and railroad cars in the statute in these regards, Customs has no latitude to provide for an exemption in the regulations for empty or in-transit trucks.

Comment:

Several companies requested an exemption from the commercial truck processing fee because of their participation in joint U.S./Canadian automotive entry release procedures, where monthly filing of entries of Automotive Products Trade Agreement (APTA) products is permitted.

Customs response:

Monthly filing of APTA entries generally expedites release and facilitates formal entry processing, but it does not absolve the carrier from undergoing Customs inspection of the conveyance and its contents to the extent deemed necessary by the inspector at the time of entry. In the absence of a specific exemption in the COBRA, an exemption from the commercial truck processing fee for carriers of merchandise where monthly entry filing occurs cannot be provided for in the regulations.

Comment:

Driveaway truck operators suggested allowing use of a "floater" commercial truck processing fee permit for drivers since the delivery of new trucks is accomplished by driving one new vehicle for delivery to a dealership while towing the others.

Customs response:

As Customs understands it, the suggested use of a "floater" permit would allow drivers to use the permit with each such delivery or, in another instance, to interchange it within a bus line having only two of its routes as commercial routes. Customs notes, however, that the $100 commercial truck processing fee permit relates only to the commercial use of a vehicle, and the benefit of obtaining a permit arises when the same commercial vehicle has multiple arrivals during a given calendar year. Since the annual permit attaches to a specific vehicle in the same way that an individual $5 fee is applied to the arriving vehicle, Customs has no authority to allow a transfer of a permit from one vehicle to another in order to follow a driver or correspond to a particular commercial route.

Comment:

One commenter requested that Customs allow payment of the commercial truck processing fee in Canadian funds.

Customs response:

Since Customs duties, taxes, and other charges are required under 19 CFR 24.1(a)(1) to be paid in U.S. funds, and in light of the amendment to the COBRA discussed above regarding the treatment of fees under the Act as Customs duties for administrative and enforcement purposes, the commercial truck processing fees must also be paid in U.S. funds.

Comment:

One commenter stated that there should be provision for a more convenient form of individual payment such as tokens, stamps or cards in order to minimize delays in producing exact change.

Customs response:

Customs inspectors and cashiers routinely make change without undue delay, and we are not aware of any particular problems with delays in this specific context. Moreover, any such delays may be avoided through use of the $100 calendar year permit which eliminates the need for individual payments.

RAILROAD CARS

Comment:

One commenter objected to the railroad car fee on general grounds, stating that the fees will create economic hardship on the already depressed agricultural industry, will require excessive administrative collection costs, and are likely to provoke retaliation by Canada and Mexico.

Customs response:

These comments involve legislative policy issues which are beyond the scope of Customs regulatory authority.

Comment:

Several commenters stated that the annual $100 fee cap should be $50 for 1986.

Customs response:

The response to the comment regarding proration of the 1986 $100 annual fee for commercial trucks set forth above is equally applicable here.

Comment:

Several commenters stated that the fee should not be charged for empty railroad cars.

Customs response:

As already noted, the COBRA was amended by the Tax Act so that the fee would not apply to empty railroad cars. Accordingly, section 24.22(d) as set forth below has been amended (1) in the basic fee provision, by referring to a "loaded or partially loaded passenger or commercial freight" railroad car, and (2) by adding a fee exemption to cover railroad cars transporting only containers, bins, racks, dunnage and other equipment or materials which have been used (as distinguished from such items in unused condition which could represent a commercial importation that would trigger collection of the arrival fee) for enclosing, supporting or protecting commercial freight, which Customs believes should be treated as empty railroad cars for purposes of the arrival fee.

Comment:

A number of commenters argued that the fees paid for individual railroad car crossings should be permitted to accumulate toward satisfying the $100 annual fee cap.

Customs response:

In light of the fact that the basic language in the COBRA regarding the annual fee limit for railroad cars is identical to that used in the case of commercial trucks, and since the Conference Report language discussed above in connection with commercial trucks applies equally to railroad cars, Customs believes that cumulation toward the annual fee limit should not be permitted for railroad cars but that prepayment of the $100 annual limit at any time during a calendar year should also be permitted in the case of railroad cars. Accordingly, section 24.22(d) as set forth below has been amended in a manner similar to the changes made to section 24.22(c) regarding commercial trucks as discussed above, the only essential difference being that in this case the prepayment will serve as a limitation on subsequent payment of individual arrival fees for a railroad car only if adequate records are maintained to enable Customs to verify that the $100 annual fee has in fact been paid on that railroad car, in recognition of the fact that railroad car fee payments and verification of those payments (including the applicability of a $100 prepayment to a specific railroad car) take place not at the time of arrival but rather at a time subsequent to the actual arrival.

Comment:

Some commenters stated that individual carriers should be permitted to submit individual fee statements to Customs, rather than relying on their industry trade group to do so on their behalf.

Customs response:

Customs has no objection to such an arrangement, and section 24.22(d) as set forth below has been modified accordingly.

Comment:

A number of commenters requested that the time limit to remit payment be extended, from 60 days following the end of a month, to 60 or 90 days following a quarter.

Customs response:

The suggestion by these commenters, if adopted, would significantly delay the collection of railroad car arrival fees. Given the fundamental administrative responsibility of Customs to ensure that statutorily mandated fees are collected in a timely fashion, it would not be appropriate to adopt this suggestion.

Comment:

Several parties commented on payment procedures in the event a dispute arises between the AAR which calculates the fees owed and an individual carrier responsible for remitting those fees, arguing that payment should be withheld pending resolution of the dispute.

Customs response:

Customs cannot agree to such an open-ended payment arrangement which could significantly delay collection of the fees. However, if the AAR and the individual carrier are unable to resolve any dispute during the 60–day time period following the close of the calendar month, a subsequent settlement of the dispute may be accounted for by means of an explanation in, and adjustment of, the next payment to Customs. Section 24.22(d) as set forth below has been amended to clarify the Customs position on this point.

Comment:

Some commenters expressed confusion over the language concerning the exemption for in-transit trains. It was pointed out in this regard that the word "train" is too imprecise because a train is nothing more than the linkage of individual cars, and it was suggested that reference be made to "the country being transited" rather than "the United States".

Customs response:

These points were resolved by the change to the in-transit exemption effected by the 1990 Act which was implemented by Customs in T.D. 91–33, as discussed above.

Comment:

One commenter suggested that "railroad car" should be specifically defined in the regulations as a carrying vehicle measured from coupler to coupler.

Customs response:

Customs agrees that such a definition would be useful, particularly in order to ensure that articulated cars are treated as one car. Accordingly, a definition of "railroad car" has been included in section 24.22(d) as set forth below.

Comment:

One commenter stated that the regulations should provide a drawback, refund or allowance procedure for railroad cars that are received in error by a carrier and returned to the United States.

Customs response:

Customs believes that such occurrences would most often involve empty cars, in which case no fee would apply as a result of the amendment to the railroad car fee provision effected by the Tax Act as discussed above. However, the fee would still apply in the case of such cars which are loaded or partially loaded, and Customs has no legal authority to provide otherwise in the regulations in the absence of supporting statutory language. It should be noted that such cars must still be cleared by Customs.

Comment:

Two commenters suggested that the railroad company bringing a car into the United States and clearing it through Customs should be the

party responsible for the fee payment, not another company receiving the car in interchange at the port of entry.

Customs response:

Customs believes that the provisions regarding responsibility for fee payments as set forth in the interim regulations should be retained because they have provided Customs with a workable method for identifying the party to which Customs will look for payment of the fees. However, so long as the actual payment to Customs is made by that party, there is nothing to prevent the two railroad companies from making their own private arrangements regarding reimbursement or allocation of the costs between them.

Comment:

One commenter urged that the in-transit exemption provision be expanded to include in-transit cars which are set out (taken off line) for repairs outside the United States and then brought back on line, provided no cargo is loaded on or unloaded from the car.

Customs response:

Customs agrees that the in-transit exemption remains applicable to such cars and, accordingly, section 24.22(d) as set forth below has been amended to clarify this point.

PRIVATE VESSELS AND AIRCRAFT

Comment:

Numerous commenters objected to the annual $25 fee for private vessels and aircraft on general grounds, stating that the assessment is unfair and discriminatory because automobiles entering the United States are not charged, that general taxes rather than user fees should be used to fund Customs operations, and that the private vessel fee will adversely affect business or trade and tourism in Canada.

Customs response:

These comments relate to legislative policy issues that are beyond the scope of the regulations.

Comment:

An association representing private vessel owners suggested the following:

1. Authorize procurement of a re-entry permit by mail order, in advance of departure to a foreign country.
2. Issue an identification permit number for the calendar year.
3. Allow permit number clearance by telephone whenever pleasure craft have nothing to clear through Customs.
4. Allow renewal of the permit number and fee, as well as pre-payment by mail for the following year, during the last 30 days of the current year.

Customs response:

Section 24.22(e) presently states that the $25 fee may be prepaid to Customs, and Customs has instituted procedures for the advance issu-

ance of decals either through local Customs offices or by mail, with the decal to be placed on the private vessel (or aircraft) as evidence that the fee has been paid for the calendar year in question. Accordingly, the first, second and fourth suggestions above have already been implemented by Customs, and section 24.22(e) as set forth below has been modified to reflect the current applicable procedures.

As regards the third suggestion, Customs currently permits telephonic report of arrival and clearance of private vessels in many districts, and such telephonic clearance normally includes verification of payment of the $25 annual fee. However, because special reporting and clearance requirements may apply in certain circumstances (see, for example, 19 CFR 4.2a), it would not be appropriate to provide for telephonic decal number clearance in these regulations.

Comment:

One commenter stated that the annual $25 fee was reasonable but objected to the $25 overtime amount for Sunday inspectional services. This commenter suggested that Customs should stagger shifts during the week in order to provide free Sunday service.

Customs response:

Pursuant to the decision of the Supreme Court in *U.S. v. Myers,* 320 U.S. 561 (1944), Customs inspectors must be paid overtime compensation for Sunday work without regard to whether the services are in addition to a regular weekly tour of duty. Therefore, staggered shifts would not alleviate the situation. However, Customs notes that section 8101(c)(1) of the Omnibus Budget Reconciliation Act of 1986 amended section 13031 of the COBRA so as to reinstate free overtime service for private aircraft on Sundays and holidays between the hours of 8 a.m. and 5 p.m. local time, thus addressing the substance of this commenter's objection as regards private aircraft but not as regards private vessels. In the absence of an appropriate statutory amendment similar to that made for private aircraft, Customs has no authority to eliminate overtime payments for Customs services provided in connection with private vessels. Section 24.22(e) as set forth below has been modified to clarify the overtime exception as regards private aircraft.

Comment:

In order to exempt private vessels which are entered in regattas, one commenter made the following suggestions:

1. Exempt all pleasure craft not carrying merchandise regardless of size;
2. Exempt all participants in competitive events where the returning craft are not carrying merchandise; or
3. Extend the vessel length exemption from 30 feet to 65.6 feet (20 meters).

Customs response:

The specific exemption for private pleasure vessels of less than 30 feet in length not carrying goods required to be declared was included in sec-

tion 24.22(e) based on a statement of intent and regulatory mandate contained in the Conference Report relating to the COBRA (which noted in this regard that Customs incurs no processing costs in clearing such vessels). Customs has no authority to extend an exemption to other classes of vessels in the absence of support therefor in the statutory language and the legislative history relating thereto.

DUTIABLE MAIL ENTRIES

Comment:

Two commenters requested that the regulations be revised to make it clear that the $5 processing fee is to be collected only when Customs prepares the entry documentation. Thus, when a customs broker prepares formal or informal entry documents, no fee would be assessed.

Customs response:

Customs notes that the statute refers to "each item of dutiable mail for which *a document* is prepared by a customs officer" (emphasis added). Moreover, even though almost all dutiable formal mail entries are prepared by brokers, Customs in such cases still may have to prepare notices of arrival or other documentation in connection with the arrival, entry and clearance of the mail shipment. Accordingly, it would be inappropriate to refer only to "entry" documentation in section 24.22(f) or to otherwise limit the application of this regulatory provision which is in accord with the language and intent of the statute.

Comment:

One commenter suggested exempting packages valued at less than $250 or reducing the amount of the fee because of the economic hardship the fee presents to small businesses.

Customs response:

Since these suggestions involve legislative policy issues and are not supported by the statutory language, Customs has no authority to include such provisions in the regulations.

COMMERCIAL VESSEL AND AIRCRAFT PASSENGERS

Comment:

Two commenters objected to the fee as a matter of principle. One commenter argued that the costs for services provided by Customs to arriving passengers should be covered out of general revenues. The other commenter argued that the fee is unfair because no other countries assess such a fee.

Customs response:

These comments involve legislative policy issues implicitly reflected in the statute itself. Accordingly, Customs has no authority to address the comments in the regulatory texts.

Comment:

One commenter stated that the exemption for transiting passengers should apply to all in-transit passengers rather than to only those not

processed by Customs. This commenter specifically suggested that the regulations be amended to refer simply to persons transiting the United states who stop over "for less than 24 hours prior to continuing on a journey to a foreign country".

Customs response:

The regulatory provision in question was included in the interim regulations on the reasoning that the arrival fee is intended to apply only in cases where Customs actually processes the passenger, and the exemption for in-transit passengers added by the Tax Act, as discussed above, explicitly recognized this principle by referring to a passenger "for whom customs inspectional services are not provided." Accordingly, the suggestion of this commenter is inconsistent with the statutory language and thus cannot be adopted. Section 24.22(g) as set forth below has been modified in this regard to reflect more accurately the statutory language.

Comment:

Two commenters stated that the exemption for in-transit passengers should not be limited to airline passengers but rather should also apply to cruise ship passengers who are transiting the United States on route to another country.

Customs response:

Neither the statute nor the regulations limit applicability of the in-transit exemption to airline passengers. Thus, in principle, it is equally applicable to cruise ship and other commercial vessel passengers. However, the exemption will apply in either case only if the passenger is in-transit to a location outside the Customs territory of the United States and is not processed by Customs during the layover (in-transit) period. As a practical matter, the exemption is applied more frequently in the case of airline passengers who often disembark and are held in a sterile, supervised in-transit lounge, without undergoing any Customs inspection, until their continuing or connecting flight is ready to leave. Unless in-transit vessel passengers who disembark similarly remain in such a secure in-transit area so as to not require Customs processing, they will not be entitled to the exemption.

Comment:

One commenter requested a list of airports which have sterile in-transit areas where passengers may remain and thus be covered by the in-transit exemption.

Customs response:

A list of airports at which sterile in-transit lounges are maintained is set forth in a brochure entitled *Travel Industry Tips* (Publication No. 529) which Customs has published and made available to the public to explain the collection process for Federal inspection fees. Copies of this brochure may be obtained by writing to: U.S. Customs Service, P.O. Box 7407, Washington, D.C. 20044.

Comment:

One commenter requested that the regulations include examples in order to address specific problems that arise when complex travel arrangements are involved (for example, when multiple layovers and arrivals in the United States occur on the same itinerary).

Customs response:

Customs does not believe that the regulations are the proper place for such examples, given the legally binding nature of the regulations and the impossibility of anticipating the myriad of specific factual patterns that would have to be covered in order for the examples to be complete and sufficiently informative. However, examples of specific travel situations have been included in the *Travel Industry Tips* brochure mentioned above.

Comment:

A commenter requested that an explicit statement be included in the regulations to the effect that arriving passengers who are exempt from application of the fee are also exempt from charges for inspectional services.

Customs response:

The passenger arrival fee is specifically intended to cover Customs costs in providing inspectional services to passengers, and there are no other Customs charges for such services which apply specifically to commercial passengers. Accordingly, the suggested statement is neither necessary nor appropriate.

Comment:

With reference to the exemption concerning persons whose journey originates in Canada, Mexico, a U.S. territory or possession, or any adjacent island, one commenter suggested that no fee should be charged if a passenger stops for layover in one of those locations even if the journey originated outside one of those locations.

Customs response:

The statutory provision regarding the cited exempt locations is strictly limited to a journey which either originated in one of those locations or originated in the United States and was limited to those locations. Thus, there is no legal basis for the suggested broad fee exemption based merely on a layover in one of the exempt locations.

Section 24.22(g) as set forth below has been modified by revising paragraph (2)(i) to reflect the Tax Act addition of the exemption for a journey which originated in the United States and was limited to the exempt locations. In addition, in order to reflect the basic Customs position set forth in Headquarters Ruling Letters 112511 and 112554 regarding the applicability of the two fee exemptions in that paragraph, the following additional changes have been made to section 24.22(g) as set forth below: (1) a new paragraph (B) has been added to paragraph (2)(i) to clarify what constitutes a journey and its origination point; (2) in the first sen-

tence of paragraph (3) concerning fee collection procedures, the words "for transportation into the customs territory of the United States" have been added to clarify the context in which ticket or travel document issuance triggers collection of the arrival fee; and (3) interim paragraph 3(ii), which does not reflect the current Customs position, has been replaced by a new text setting forth an example in which the arrival fee is collected because the journey did not meet all conditions for exemption under the provision added by the Tax Act.

Comment:

One commenter stated that United Nations officials should be accorded the same exemption from the fee as persons who have full diplomatic status.

Customs response:

The exemption for diplomats was included in the interim regulations because the Conference Report pertaining to the COBRA stated that the conferees agreed that the fee should not apply to "diplomats entering the United States." Customs believes that the conferees intended to exempt from the fee those officials and other personnel of foreign governments and international organizations (including the United Nations) who may be exempt from normal Customs clearance procedures and requirements under Subchapter VI of Chapter 98 of the Harmonized Tariff Schedule of the United States and as provided in Part 148 of the Customs Regulations (19 CFR Part 148). Customs further notes that diplomatic status for purposes of United States law is dependent on the issuance of the appropriate visa by the U.S. Department of State and is not controlled by the issuance of a passport or other identifying document by a foreign government. In order to ensure that the fee exemption for diplomats clearly reflects the intent and can be easily and consistently applied, section 24.22(g)(2)(iii) as set forth below has been modified so that the exemption will be applied with reference to specific classes of visas issued by the Department of State.

Comment:

A commenter took issue with the requirement that commercial air carriers collect the fee since it is the passenger who is liable for paying the fee, and this commenter argued that the regulations should absolve carriers from responsibility for collecting the fee when the passenger refuses to pay it. This same commenter suggested that the word "collected" should be changed to read "assessed" in interim section 24.22(g)(3).

Customs response:

With regard to the first point, the statute sets forth the general rule that the fee shall be collected from the passenger by the person who issues a transportation document or ticket and that such collection shall take place when the document or ticket is issued. Given this statutory specificity, Customs cannot amend the regulations as this commenter suggests, and Customs further notes that when a passenger refuses to

pay the fee, the carrier can solve the collection responsibility problem by simply declining to issue the document or ticket to that passenger. As regards the second point, since both the regulatory provision in question and the statutory provision on which it is based specifically concern the collection procedure (it is the statute itself which "assesses" the fee), it would not be appropriate to use the word "assessed" in the regulatory provision.

Comment:

One commenter suggested that responsibility for collecting the fee should rest with the carrier which actually transports the passenger rather than the carrier which issued the ticket.

Customs response:

Customs would also prefer to have responsibility for collection rest with the transporting carrier as this would greatly facilitate verification of required fee payments. However, given the specificity of the statute in this regard, in the absence of an appropriate statutory amendment Customs has no authority to amend the regulations to reflect this commenter's suggestion.

Comment:

Two commenters argued that charter airlines should be responsible for the remittance of fees collected by tour operators, and they further suggested in this regard that the regulations be amended to require that tour operators remit the collected fees to the charter operators for this purpose.

Customs response:

The statute states that the person "who collects" the passenger fees shall remit those fees to the Government. Since under the statute collection of the fees normally takes place when the transportation document or ticket is issued (in this case, by the tour operator), Customs has no authority to amend the regulations as suggested by these commenters.

Comment:

Two commenters suggested that, in the case of charter operations, verification of fee payments should be based on the passenger manifest rather than on the tickets issued; under this procedure, tour operators would advise the carriers in writing via the manifests of the number of passengers who paid the fee. The same commenters also stated that the flight manifest should be used as the travel document for purposes of determining when remittance of the fees is due, because most charter airlines use the flight manifest in order to determine when a charter will leave and how many passengers are booked.

Customs response:

In view of the specific statutory requirements regarding when and by whom the fees are to be collected and remitted, and in consideration of the fact that the intent of Congress was that the passenger (who is the recipient of the Customs inspectional services) pay the fee, the flight manifest cannot be used in the manner suggested by these commenters.

Comment:

One commenter stated that commercial air carriers prefer to have the option of collecting the fee in lieu of collection by U.S.-based tour wholesalers who contract for passenger space.

Customs response:

To the extent that the tour wholesalers issue the tickets (and thus under the statute are required to collect the fee), Customs has no authority to provide in the regulations for collection of the fee by the carrier.

Comment:

One commenter criticized the requirement that carriers collecting the fee at a departure airport must issue a receipt to the passenger, stating that carriers should be allowed to issue a stamp similar to "U.S. Transportation Tax" in lieu of a receipt. Another commenter stated that the regulations should specify the types of receipts that are permissible.

Customs response:

The regulatory requirement of issuance of a receipt to a passenger applies only when the fee is collected from the passenger at the time of departure from the United States due to a failure to collect the fee at the time of issuance of the ticket at an overseas location; the regulation reflects a specific statutory requirement and thus cannot refer to the issuance of anything other than a "receipt" as provided in the statute. Customs does not believe that it would be appropriate to specify in the regulations what type of "receipt" would be permissible because the party collecting the fee should have sufficient flexibility to adopt a procedure that is compatible with its particular operational requirements and procedures.

On a related point, Customs notes that the COBRA requires that the fee be separately identified on the document or ticket as a "Federal inspection fee", whereas interim section 24.22(g)(4) merely required that the ticket or travel document be "marked to indicate that the required fee has been collected from the passenger." The regulatory text as set forth below (and renumbered as 24.22(g)(3) as discussed below) has been modified to conform to the statutory requirement but with reference to Federal inspection "fees" in order that other Federal agency inspection fees may be included as necessary.

Comment:

With regard to the basic requirement that the carrier issuing the ticket or travel document is responsible for collecting the fee, one commenter stated that carriers should also be able to collect the fee on prepaid tickets or travel documents (in order to avoid, for example, having to collect the fee from a minor with a prepaid ticket).

Customs response:

This commenter correctly notes that there may be a distinction between the time at which a passenger actually takes physical possession of a ticket and the time at which payment for the ticket is effected. However, this should not present a problem even in the case of prepaid tick-

ets, provided it is understood that ticket "issuance" includes the act of preparing the ticket by the carrier, because the carrier can (and should) ensure collection of the fee by including the fee among the charges reflected on the ticket and paid by the ticket purchaser.

Comment:

In consideration of the fact that refunds of collected fees will sometimes be necessary, one commenter requested that a procedure be implemented to allow airlines to adjust the remitted amount from quarter to quarter.

Customs response:

Customs agrees that, if an explanation is provided with the payment, adjustments of previously remitted fees may be reflected in the next quarterly payment to Customs. Section 24.22(g) as set forth below has been modified accordingly.

Comment:

In cases involving split charters whereby several tour operators charter space on one aircraft, one commenter suggested that the tour operator who contracts with the passengers, rather than the carrier, is in the best position to collect and remit the fees to Customs.

Customs response:

If the tour operator issues the ticket or other travel document, the statute requires that the tour operator collect and remit the fees to Customs.

Although the last sentence of interim section 24.22(g)(4) clarified the responsibilities of U.S.-based tour wholesalers who issue non-carrier tickets, Customs notes that the first sentence of that section (which set forth the basic fee collection requirement) only referred to "carriers". Accordingly, the first sentence of interim section 24.22(g)(4) has been modified to refer to "each air or sea carrier, travel agent, tour wholesaler, or other party" issuing a ticket or travel document in order to clarify the statutorially-mandated responsibility, and corresponding changes also have been made to the texts of interim sections 24.22(g)(5) and (7) which are a direct consequence of the collection requirement. In addition, the first sentence of interim section 24.22(g)(4) has been further modified by removing the words "on or after July 7, 1986," which were included only because the interim regulations were published prior to the effective date of the statutory fees. Finally, the texts of interim sections 24.22(g)(3) and (4) have been combined into one section 24.22(g)(3) covering all fee collection procedures, with a consequential renumbering of the succeeding paragraphs under section 24.22(g).

Comment:

One commenter expressed concern that the required accounting and operating procedures to be followed by clerks and attendants in collecting and verifying the fees will be viewed by passengers as a reduction in the quality of service. This commenter also complained that the general

records maintenance requirement will increase expenses by necessitating additional staff.

Customs response:

Notwithstanding the perceived or actual effect which these requirements may have, they are central and thus necessary to the proper administration of the statutory fee provisions. Accordingly, there is no practical means for addressing these concerns in the regulations.

Comment:

One commenter suggested that when fees are collected in a foreign country, they should be collected in the local currency using the exchange rate applicable on the date of collection and, for purposes of remittance to Customs, the fees so collected should be converted to U.S. dollars using the exchange rate in effect on the date of remittance.

Customs response:

Customs currently allows for the procedure suggested by this commenter. The Customs position on this point is also reflected in the *Travel Industry Tips* brochure mentioned above.

Comment:

One commenter requested that the second sentence of interim section 24.22(g)(7) be modified to require retention of records for 2 years after "fee collection" rather than "fee calculation".

Customs response:

Customs cannot agree to this request. Given the fact that payments and statements are submitted to Customs only quarterly (and may be submitted as late as 31 days after the close of the quarter), the effect of this proposed change would be to significantly shorten the record retention period with regard to those fees collected in the early part of the subject quarter. In order to ensure that Customs is able to perform a timely and accurate verification of payments, the records retention period must cover both the calculation itself and all the collection records upon which the calculation was based.

Comment:

One commenter requested that the regulations specify the types of records that are to be maintained.

Customs response:

Customs agrees in principle that it would be useful to clarify in the regulations the types of records or information that should be maintained to enable Customs to verify that the fees have been properly collected and remitted. However, Customs believes that this document is not the proper vehicle for such action, which could have the effect of imposing new substantive requirements on the public and thus should be the subject of further public comment procedures.

Comment:

One commenter suggested that the deadline for quarterly payment and statement filing (31 days after the close of the calendar quarter) be

extended by 60 days to avoid the need for estimates and ensure remittance of the correct amount.

Customs response:

The deadline set forth in the regulations reflects a requirement in the statute and thus must be retained. Moreover, Customs believes that the addition of a provision allowing reconciliation of quarterly payments in the following quarter, as discussed above, will address the main concerns of this commenter.

Comment:

One commenter pointed out that charter airlines already file quarterly reports with the U.S. Department of Transportation (DOT) and suggested that Customs review those quarterly reports to see if they would be sufficient for Customs purposes.

Customs response:

Although information filed with the DOT may be useful to Customs for fee verification purposes in some circumstances, it would not be sufficient in and of itself because it only reflects passengers transported by carriers and thus would not provide complete information regarding fee collection which is based on ticket issuance rather than passenger arrivals.

Comment:

Three commenters raised issues regarding the provision of adequate services to passengers as required by the COBRA, which was not addressed in the interim regulations. One commenter stated that a system should be implemented allowing airlines to notify Customs of intended arrival and that there should be some assurance regarding adequacy of personnel to clear passengers so that no passenger is required to wait in line for more than 20 minutes. Another commenter requested that Customs specify how adequacy of service will be assured and suggested that a telephone number be provided for purposes of reporting bad service. The third commenter requested inclusion of language in the regulations stating that charter airline passengers are entitled to the same service, and at no additional cost, as in the case of scheduled airline passengers because charter airlines also operate on a schedule.

Customs response:

As regards notification of arrival, Part 122 of the Customs Regulations contains detailed provisions regarding the applicable procedures. With respect to the issue of adequacy and cost of service provided by Customs, it is noted that the COBRA was extensively amended in this regard by section 8101(c) of the Omnibus Budget Reconciliation Act of 1986, by section 1893(d) of the Tax Act, and by section 9501(a) of the Omnibus Budget Reconciliation Act of 1987 (Public Law 100–203). Those amendments expanded the scope of the services that must be adequately provided, included specific factors to be taken into account in determining whether service is adequately provided, and expanded the

list of services for which only fees under the COBRA may be charged. Consistent with the statutory mandate, the policy of Customs is to provide the most efficient and responsive service possible to all carriers (whether regularly scheduled or charter) and passengers, and included in this policy is a goal of processing all passengers within 20 minutes or less. Because most delays or other inspectional or clearance problems result from conditions arising at the local level, Customs suggests that any complaints be directed to the regional commissioner or district director of Customs having jurisdiction over the location where the flight was processed. As regards inclusion of adequate service standards in the regulations, Customs believes that this final rule document is not the proper vehicle for such proposals.

CUSTOMS BROKERS

One commenter made a number of points on behalf of brokers nationwide with regard to the permit fee.

Comment:

The commenter stated that confusing instructions were issued to Customs personnel concerning the permit fee, in particular regarding its applicability to inactive brokers and to individually-licensed brokers employed by a corporate broker.

Customs response:

When these problems were brought to the attention of Customs Headquarters, additional clarifying instructions were issued to all Customs field offices.

Comment:

The commenter stated that the automatic permit revocation procedure set forth in section 111.96 of the interim regulations for failure to timely pay the fee, by not allowing a reasonable opportunity to cure the default, amounts to a denial of due process.

Customs response:

Even though the interim regulations were published on June 11, 1986, and went into effect on July 7, 1986, Customs gave brokers an additional grace period, until August 6, 1986, to pay the annual permit fee for 1986. Moreover, Customs exercised a policy of leniency as regarded payment of the 1986 fee in order to avoid precipitous revocation of permits for failure to timely pay the fee. Thus, brokers were given ample notice and opportunity to pay the 1986 fee and thus retain their permits.

On the broader issue of due process, Customs would point out that since the Tax Act amendments discussed above explicitly ratified the regulatory principle of permit revocation for failure to timely pay the fee, provided appropriate notice of the due date has been published in the Federal Register, the issue of due process is essentially moot from a regulatory standpoint.

Comment:

This commenter argued that the permit fee for 1986 should be reduced to one-half the full-year amount due to its mid-year implementation.

Customs response:

This issue was resolved in the Tax Act as discussed above.

Comment:

The commenter stated that an actual permit document should be made available to each broker.

Customs response:

Such documents were issued to all Customs districts for immediate use in December 1986.

ADDITIONAL CHANGES TO THE REGULATIONS

In addition to the changes to the interim regulatory texts discussed above, the final regulations as set forth below incorporate (1) a number of non-substantive, editorial (organizational or drafting) changes to improve the clarity and readability of the regulations and (2) some necessary substantive changes involving subsequent statutory amendments and other matters not specifically discussed above in connection with the public comments. The principal editorial changes and additional substantive changes are described below.

Section 24.22:

Paragraph (a) has been limited to definitions that apply to more than one of the other paragraphs under the section. Those definitions which pertain to only one such paragraph appear as part of the substantive fee provision.

Where applicable, separate subparagraphs have been included to cover annual fee limitations for individual arrival fees, prepayment of fees, and fee exceptions where more than one category of exemption applies to the fee in question. Each prepayment subparagraph reflects current payment procedures, including procedures for lump sum mid-year payment of both annual fees and any remaining balance where a calendar year limit applies to an individual arrival fee. Fee exceptions have been added to cover the Tax Act addition of exemptions for commercial trucks, railroad cars and private vessels transported by any vessel other than a ferry.

With regard to the commercial passenger arrival fee, the fee exemption covering crew members and persons directly connected with the operation, navigation, ownership, or business of the vessel or aircraft has been modified to reflect the longstanding Customs position, as stated in the *Travel Industry Tips* brochure mentioned above, that the exemption applies only to official business travel and not to travel for pleasure. In addition, the following changes have been made to the paragraph covering payment and quarterly statement procedures (paragraph (g)(4) as

set forth below): (1) in order to more clearly reflect the necessary correlation between the statutory obligation to collect the fees and the consequent statutory obligation to remit those fees to Customs, reference is made to payment to Customs of the fees "required to be" collected (thus, the amount remitted must be equal to the amount of fees required to be collected under the statute, even if some required fees were in fact not collected); and (2) the provision regarding fee payment responsibility where the (foreign) ticket or travel document issuer has not collected the fee has been changed to more closely align on the wording of the statute and paragraph (g)(3). Finally, the paragraph concerning the limitation on charges (paragraph (g)(7) as set forth below) has been redrafted to more accurately reflect the terms of the statutory provision on which it is based (19 U.S.C. 58c(e)(1)), in particular to cover the exception regarding reimbursement for costs incurred by Customs in connection with user fee airports, and the references in this paragraph to provisions within Part 6 have been changed to reflect the replacement of Part 6 by Part 122 as further discussed below.

The payment procedures applicable under paragraph (i)(1) have been clarified by insertion of a cross-reference to section 24.1 (which concerns general collection requirements and procedures that are equally applicable to the fees under section 24.22) and by inclusion of the identifying payment class codes (subsequently implemented by Customs for accounting and reporting purposes) to be referenced on a check or money order payment.

Part 111:

In order to ensure applicability of the proper procedures, the second sentence of section 111.96(c) has been amended by inserting a cross-reference to the remittance procedures set forth in section 24.22(i). In addition, the third sentence of section 111.96(c) has been redrafted (1) to clarify the intended effect of the sentence, *i.e.* that no proration of a mid-year fee payment will be allowed, and (2) to include a reference to a permit application under section 111.19(b) in order to ensure procedural consistency between that section and section 111.96(c).

Part 122:

As noted above, Part 6 concerning air commerce regulations was revised and redesignated as Part 122 following publication of the interim regulations implementing the COBRA (which included a new section 6.1a setting forth a cross-reference to the interim section 24.22 fees as regards private aircraft and passengers aboard commercial aircraft). The final texts of Part 122 were adopted on April 21, 1988, as T.D. 88–12, 55 F.R. 9285.

It is further noted, however, that no direct counterpart to interim section 6.1a was included in the final texts of Part 122. Moreover, present section 122.29, which concerns overtime services for private aircraft, is incorrect in referring in this context to overtime charges which no longer apply to private aircraft as discussed above. In addition, there is

no need for a cross-reference to passenger fees which apply only in regard to commercial aircraft. In order to address these issues, section 122.29 has been revised (1) to set forth a cross-reference to section 24.22 as regards the private aircraft arrival fee and (2) to set forth a cross-reference to section 24.16 only with regard to the procedures for requesting overtime services.

Part 123:

The interim texts implementing the COBRA included a new section 123.1a which referred to section 24.22 as regards fees applicable to commercial trucks, truck cabs, and railroad cars whether empty or otherwise. Customs now believes that it would be preferable to remove this section, which represents an exception to normal regulatory numbering rules, and to include an appropriate cross-reference to the section 24.22 fees in section 123.0 which describes the overall scope of Part 123 and which already contains cross-references to Part 122 as regards aircraft and to Part 4 as concerns vessels. Accordingly, a new sentence, with a simplified text, has been added at the end of section 123.0 for this purpose.

Part 145:

For the same reasons stated above in regard to Part 123, interim section 145.1a has been removed and a new sentence containing a cross-reference to the section 24.22 dutiable mail fee has been added to section 145.0 which concerns the scope of Part 145.

Part 178:

The changes to Part 178 involve removing from section 178.2 the listings for sections 4.98(i), 123.1a and 145.1a, which either are simply cross-reference provisions containing no substantive requirements or have been replaced in this document by cross-reference provisions as discussed above.

Conclusion

Accordingly, based on the comments received and the analysis of those comments as set forth above, and based on the statutory changes and additional considerations discussed above, Customs believes that the interim regulations published as T.D. 86–109 should be adopted as a final rule with certain changes thereto as discussed above and set forth below.

Executive Order 12866

This document does not meet the criteria for a "significant regulatory action" as specified in E.O. 12866.

Regulatory Flexibility Act

Based on the supplementary information set forth above and because these regulations concern the collection of fees that are mandated by statute, pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.),* it is certified that the regulations will not have a significant economic impact on a substantial number of small entities.

Accordingly, the regulations are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

PAPERWORK REDUCTION ACT

The collection of information in these final regulations, contained in section 24.22, has been reviewed and approved by the Office of Management and Budget in accordance with the requirements of the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1515–0154. The estimated average annual burden associated with this collection is .25 hours per respondent or recordkeeper. Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be directed to the U.S. Customs Service, Paperwork Management Branch, Room 6316, 1301 Constitution Avenue, N.W., Washington, D.C. 20229, or the Office of Management and Budget, Attention: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, D.C. 20503.

DRAFTING INFORMATION

The principal author of this document was Francis W. Foote, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS

19 CFR Part 4

Customs duties and inspection, Maritime carriers, Cargo vessels, Passenger vessels, Yachts.

19 CFR Part 24

Customs duties and inspection, Accounting, Claims, Taxes, Wages, User fees.

19 CFR Part 111

Customs duties and inspection, Imports, Administrative practice and procedure, Brokers.

19 CFR Part 122

Customs duties and inspection, Imports, Air carriers, Air transportation, Aircraft, Airports.

19 CFR Part 123

Customs duties and inspection, Canada, Mexico, Motor carriers, Railroads, Vessels.

19 CFR Part 145

Customs duties and inspection, Postal service.

19 CFR Part 178

Reporting and recordkeeping requirements, Paperwork requirements, Collections of information.

AMENDMENTS TO THE REGULATIONS

Parts 4, 24, 111, 122, 123, 145 and 178, Customs Regulations (19 CFR Parts 4, 24, 111, 122, 123, 145 and 178), are amended as set forth below:

PART 4 – VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The authority citation for Part 4 continues to read in part as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1624; 46 U.S.C. App. 3;

* * * * * * *

Section 4.98 also issued under 31 U.S.C. 9701;

* * * * * * *

2. Section 4.98(i) is revised to read as follows:

§ 4.98 Navigation fees.

* * * * * * *

(i) Private and commercial vessels, and passengers aboard commercial vessels, may be subject to the payment of fees for services provided in connection with their arrival as set forth in § 24.22 of this chapter.

* * * * * * *

PART 24 – CUSTOMS FINANCIAL AND ACCOUNTING PROCEDURE

1. The authority citation for Part 24 continues to read in part as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 58a–58c, 66, 1202 (General Note 8, Harmonized Tariff Schedule of the United States), 1624, 31 U.S.C. 9701, unless otherwise noted.

* * * * * * *

2. The authority citation for section 24.23 is removed.

3. Section 24.22 is revised to read as follows:

§ 24.22 Fees for certain services.

(a) *Definitions.* For purposes of this section:

(1) The term "vessel" includes every description of watercraft or other contrivance used or capable of being used as a means of transportation on water but does not include any aircraft.

(2) The term "arrival" means arrival at a port of entry in the customs territory of the United States or at any place serviced by any such port of entry.

(3) The expression "calendar year" means the period from January 1 to December 31 of any particular year.

(4) The term "ferry" means any vessel which is being used to provide transportation only between places that are no more than 300 miles apart and which is being used to transport only:

(i) passengers, and/or

(ii) vehicles, or railroad cars, which are being used, or have been used, in transporting passengers or goods.

(b) *Fee for arrival of certain commercial vessels.*

(1) *Vessels of 100 net tons or more.*

(i) *Fee.* Except as provided in paragraphs (b)(2) and (b)(4) of this section, a processing fee in the amount of $397 shall be tendered by the

master, licensed deck officer, or purser upon arrival of any commercial vessel of 100 net tons or more which is required to enter under § 4.3 of this chapter or upon arrival of any U.S.-flag vessel of 100 net tons or more proceeding coastwise under § 4.85 of this chapter. The fee shall be collected for each arrival regardless of the number of arrivals taking place in the course of a single voyage.

(ii) *Fee limitation.* No fee or portion thereof shall be collected under paragraph (b)(1)(i) of this section for the arrival of a vessel during any calendar year after a total of $5,955 in fees has been paid under paragraphs (b)(1)(i) and (b)(2)(i) of this section for all arrivals of such vessel during such calendar year, provided that adequate proof of such total payment is submitted to Customs.

(2) *Barges and other bulk carriers from Canada or Mexico.*

(i) *Fee.* A processing fee of $100 shall be tendered upon arrival of any barge or other bulk carrier which arrives from Canada or Mexico either in ballast or transporting only cargo laden in Canada or Mexico. The fee shall be collected for each arrival regardless of the number of arrivals taking place in the course of a single voyage. For purposes of this paragraph, the term "barge or other bulk carrier" means any vessel, other than a ferry, which is not self-propelled or which transports fungible goods that are not packaged in any form.

(ii) *Fee limitation.* No fee or portion thereof shall be collected under paragraph (b)(2)(i) of this section for the arrival of a barge or other bulk carrier during any calendar year after a total of $1,500 in fees has been paid under paragraphs (b)(1)(i) and (b)(2)(i) of this section for all arrivals of such vessel during such calendar year, provided that adequate proof of such total payment is submitted to Customs.

(3) *Prepayment.* The vessel operator, owner or agent may at any time prepay the maximum calendar year amount specified in paragraph (b)(1)(ii) or (b)(2)(ii) of this section or any remaining portion thereof if individual arrival fees have already been paid on the vessel for that calendar year. Prepayment may be made at a Customs district or port office or may be mailed to: U.S. Customs Service, National Finance Center, P.O. Box 68907, Indianapolis, Indiana 46268. In a case involving prepayment of the remaining portion of a maximum calendar year amount, certified copies of receipts (Customs Form 368 or 368A) issued for individual arrival fee payments during the calendar year shall accompany the payment. Where prepayment is made by mail, the payment shall be accompanied by a letter which sets forth the name of the vessel covered by the payment, the calendar year to which the payment applies, a return address, and any other information required under paragraph (i)(1) of this section.

(4) *Exceptions.* The following vessels are exempt from payment of the fees specified in paragraphs (b)(1) and (b)(2) of this section:

(i) Foreign passenger vessels making at least three trips a week from a port in the United States to the high seas and returning to the same U.S.

port without having touched any foreign port or place, even though formal entry is still required;

(ii) Any vessel which, at the time of arrival, is being used solely as a tugboat;

(iii) Any government vessel for which no report of arrival or entry is required as provided in § 4.5 of this chapter; and

(iv) A ferry.

(c) *Fee for arrival of a commercial truck.*

(1) *Fee.* The driver or other person in charge of a commercial truck shall, upon arrival, proceed to Customs and tender the sum of $5 for the services provided. The fee shall not apply to any commercial truck which, at the time of arrival, is being transported by any vessel other than a ferry. For purposes of this paragraph, the term "commercial truck" means any self-propelled vehicle, including an empty vehicle or a truck cab without a trailer, which is designed and used for the transportation of commercial merchandise or for the transportation of non-commercial merchandise on a for-hire basis.

(2) *Fee limitation.* No fee shall be collected under paragraph (c)(1) of this section for the arrival of a commercial truck during any calendar year once a prepayment of $100 has been made and a decal has been affixed to the vehicle windshield as provided in paragraph (c)(3) of this section.

(3) *Prepayment.* The owner, agent or person in charge of a commercial truck may at any time prepay a fee of $100 to cover all arrivals of such commercial truck during a calendar year or any remaining portion of a calendar year. Prepayment may be made at a Customs district or port office or by mail in accordance with paragraph (i)(1) of this section, and each prepayment shall be accompanied by a properly completed Customs Form 339, Annual User Fee Decal Request. Once the prepayment has been made under this paragraph, a decal will be issued for placement in the lower left hand corner of the vehicle windshield to show that the vehicle is exempt from payment of the fee for an individual arrival during the applicable calendar year or any remaining portion thereof.

(d) *Fee for arrival of a railroad car.*

(1) *Fee.* Except as provided in paragraph (d)(6) of this section, a fee of $7.50 shall be charged for the arrival of each loaded or partially loaded passenger or commercial freight railroad car. The railroad company receiving a railroad car in interchange at a port of entry or, barring interchange, the company moving a car in line haul service into the customs territory of the United States, shall be responsible for payment of the fee. Payment of the fee shall be made in accordance with the procedures set forth in paragraph (d)(3) or (d)(4) of this section. For purposes of this paragraph, the term "railroad car" means any carrying vehicle, measured from coupler to coupler and designed to operate on railroad tracks, other than a locomotive or a caboose.

(2) *Fee limitation.* No fee shall be collected under paragraph (d)(1) of this section for the arrival of a railroad car during any calendar year

once a prepayment of $100 has been made as provided in paragraph (d)(3) of this section, provided that adequate records are maintained to enable Customs to verify any such prepayment.

(3) *Prepayment.* As an alternative to the payment procedures set forth in paragraph (d)(4) of this section, a railroad company may at any time prepay a fee of $100 to cover all arrivals of a railroad car during a calendar year or any remaining portion of a calendar year. Each prepayment, accompanied by a letter setting forth the railroad car number(s) covered by the payment, the calendar year to which the payment applies, a return address, and any additional information required under paragraph (i)(1) of this section, shall be mailed to: National Finance Center, Revenue Branch, P.O. Box 68907, Indianapolis, Indiana 46268.

(4) *Statement filing and payment procedures.*

(i) The Association of American Railroads (AAR), the National Railroad Passenger Corporation (AMTRAK), and any railroad company preferring to act individually, shall file monthly statements with Customs, and shall make payment of the arrival fees to Customs, in accordance with the procedures set forth in paragraphs (d)(4)(ii) and (i) of this section. Each monthly statement shall indicate:

(A) The number of railroad cars subject to the arrival fee during the relevant period;

(B) The number of such railroad cars pulled by each carrier; and

(C) The total processing fees due from each carrier for the relevant period.

(ii) AMTRAK and railroad companies acting individually shall file each monthly statement within 60 days after the end of the applicable calendar month, and the fees covered by each statement shall be remitted with the statement. Monthly statements prepared by the AAR on behalf of individual railroad companies shall be filed within 60 days after the end of the applicable calendar month, and each railroad company shall remit the fees as calculated for it by the AAR within 60 days after the end of that calendar month. In cases of conflict between the AAR and an individual railroad company regarding calculation of the fees, the railroad company shall timely remit the amount as calculated by the AAR even if the dispute is unresolved. Subsequent settlements may be accounted for by an explanation in, and adjustment of, the next payment to Customs.

(5) *Maintenance of records.* The AAR, AMTRAK, and each railroad company preparing and filing its own statements shall maintain all documentation necessary for Customs to verify the accuracy of the fee calculations and to otherwise determine compliance under the law. Such documentation shall be maintained for a period of 3 years from the date of fee calculation. The AAR, AMTRAK, and each railroad company preparing and filing its own statements shall provide to Customs the name, address, and telephone number of a responsible officer who is able to verify any statements or records required to be filed or maintained under this section, and shall promptly notify Customs of any

changes in identifying information previously submitted, in accordance with the procedures set forth in paragraph (i)(2) of this section.

(6) *Exceptions.* The following railroad cars are exempt from payment of the fee specified in paragraph (d)(1) of this section:

(i) Any railroad car whose journey originates and terminates in the same country, provided that no passengers board or disembark from the train and no cargo is loaded or unloaded from the car while the car is within any country other than the country in which the car originates and terminates, including any such railroad car which is set out for repairs outside the United States and then returned to on-line service without having undergone loading or unloading of passengers or cargo during the repair period;

(ii) Any railroad car transporting only containers, bins, racks, dunnage and other fixed or loose equipment or materials which have been used for enclosing, supporting or protecting commercial freight; and

(iii) Any railroad car which, at the time of arrival, is being transported by any vessel other than a ferry.

(e) *Fee for arrival of a private vessel or private aircraft.*

(1) *Fee.* Except as provided in paragraph (e)(3) of this section, the master or other person in charge of a private vessel or private aircraft shall, upon first arrival in any calendar year, proceed to Customs and tender the sum of $25 to cover services provided in connection with all arrivals of such vessel or aircraft during that calendar year. Upon payment of this annual fee, a decal will be issued and shall be affixed to the vessel or aircraft as evidence that the fee has been paid. Except in the case of private aircraft, all overtime charges provided for in this part remain payable notwithstanding payment of the fee specified in this paragraph.

(2) *Prepayment.* A private vessel or private aircraft owner or operator may, at any time during the calendar year, prepay the $25 annual fee specified in paragraph (e)(1) of this section. Prepayment may be made at a Customs district or port office, or by mail in accordance with paragraph (i)(1) of this section, and shall be accompanied by a properly completed Customs Form 339, Annual User Fee Decal Request.

(3) *Exceptions.* The following are exempt from payment of the fee specified in paragraph (e)(1) of this section:

(i) Private pleasure vessels of less than 30 feet in length, so long as they are not carrying any goods required to be declared to Customs;

(ii) Any private pleasure vessel granted a cruising license under § 4.94 of this chapter, during the term of the license; and

(iii) Any private vessel which, at the time of arrival, is being transported by any vessel other than a ferry.

(f) *Fee for dutiable mail.* The addressee of each item of dutiable mail for which a Customs officer prepares documentation shall be assessed a processing fee in the amount of $5. When the merchandise is delivered by the Postal Service, the fee shall be shown as a separate item on the entry and collected at the time of delivery of the merchandise along with any duty and taxes due. When Customs collects the fee directly from the

importer or his agent, the fee will be included as a separate item on the informal entry or entry summary document.

(g) *Fee for arrival of passengers aboard commercial vessels and commercial aircraft.*

(1) *Fee.* Except as provided in paragraph (g)(2) of this section, a fee of $5 shall be collected and remitted to Customs for services provided in connection with the arrival of each passenger aboard a commercial vessel or commercial aircraft from a place outside the United States.

(2) *Exceptions.* The fee specified in paragraph (g)(1) of this section shall not apply to the following categories of arriving passengers:

(i)(A) Persons whose journey:

(*1*) Originates in Canada, Mexico, a territory or possession of the United States, or any adjacent island; or

(*2*) Originates in the United States and is limited to Canada, Mexico, territories and possessions of the United States, and adjacent islands.

(B) For purposes of paragraph (g)(2)(i)(A) and paragraph (g)(3) of this section, a journey, which may encompass multiple destinations and more than one mode of transportation, shall be deemed to originate in the location where the person's travel begins under cover of a transaction which includes the issuance of a ticket or travel document for transportation into the customs territory of the United States. In addition, for purposes of this paragraph, territories and possessions of the United States include American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands, and adjacent islands include all of the islands in the Caribbean Sea, the Bahamas, Bermuda, St. Pierre, Miquelon, and the Turks and Caicos Islands.

(ii) Crew members and persons directly connected with the operation, navigation, ownership or business of the vessel or aircraft, provided such crew member or other person is traveling for an official business purpose and not for pleasure;

(iii) Diplomats and other persons in possession of a visa issued by the U.S. Department of State in class A–1, A–2, C–2, C–3, G–1 through G–4, or NATO 1–6;

(iv) Persons departing from and returning to the United States without having touched a foreign port or place;

(v) Persons arriving as passengers on any aircraft used exclusively in the governmental service of the United States or a foreign government, including any agency or political subdivision thereof, so long as the aircraft is not carrying persons or merchandise for commercial purposes. Passengers on commercial aircraft under contract to the U.S. Department of Defense are exempted if they have been precleared abroad under the joint DOD/Customs Military Inspection Program;

(vi) Persons arriving on an aircraft due to an emergency or forced landing when the original destination of the aircraft was a foreign airport; and

(vii) Persons who are in transit to a destination outside the United States and for whom Customs inspectional services are not provided.

(3) *Fee collection procedures.* Each air or sea carrier, travel agent, tour wholesaler, or other party issuing a ticket or travel document for transportation into the customs territory of the United States is responsible for collecting from the passenger the fee specified in paragraph (g)(1) of this section. The fee shall be separately identified with a notation "Federal inspection fees" on the ticket or travel document to indicate that the required fee has been collected from the passenger. If the ticket or travel document is not so marked and was issued in a foreign country, the fee shall be collected by the departing carrier upon departure of the passenger from the United States. If the fee is collected at time of departure from the United States, the carrier making the collection shall issue a receipt to the passenger. U.S.-based tour wholesalers who contract for passenger space and issue non-carrier tickets or travel documents shall collect the fee in the same manner as a carrier. Collection of the fee shall include the following circumstances:

(i) When a through ticket or travel document is issued covering a journey into the customs territory of the United States which originates in a location other than one specified in paragraph (g)(2)(i)(A) of this section;

(ii) When a return ticket or travel document is issued in connection with a journey which originates in the United States and includes a stop in a location other than one specified in paragraph (g)(2)(i)(B) of this section; or

(iii) When a passenger arrives in the customs territory of the United States in transit from a location other than one specified in paragraph (g)(2)(i)(A) of this section and is processed by Customs.

(4) *Payment and quarterly statement procedures.* Payment to Customs of the fees required to be collected under paragraphs (g)(1) and (3) of this section shall be made no later than 31 days after the close of the calendar quarter in which the fees were required to be collected from the passenger. Payment of the fees shall be made by the air or sea carrier, travel agent, tour wholesaler, or other party which issued the ticket or travel document or, in the case of a ticket or travel document issued in a foreign country without the required notation to indicate that the fee was collected from the passenger, by the carrier which provided transportation to the passenger when departing from the United States. Each quarterly fee payment shall be remitted in accordance with the procedures set forth in paragraph (i) of this section and shall be accompanied by a statement which includes the following information:

(i) The name and address of the party remitting payment;

(ii) The taxpayer Identification number of the party remitting payment; and

(iii) The calendar quarter covered by the payment.

Overpayments or underpayments may be accounted for by an explanation in, and adjustment of, the next due quarterly payment to Customs.

(5) Each carrier contracting with a U.S.-based tour wholesaler is responsible for notifying Customs of each flight or voyage so contracted, the number of spaces contracted for on each flight or voyage, and the name, address and taxpayer identification number of the tour wholesaler, within 31 days after the close of the calendar quarter in which such a flight or voyage occurred.

(6) *Maintenance of records.* Each air or sea carrier, travel agent, tour wholesaler, or other party affected by this paragraph shall maintain all such documentation necessary for Customs to verify the accuracy of fee calculations and to otherwise determine compliance under the law. Such documentation shall be maintained for a period of 2 years from the date of fee calculation. Each such affected party shall provide to Customs the name, address, and telephone number of a responsible officer who is able to verify any statements or records required to be filed or maintained under this section, and shall promptly notify Customs of any changes in the identifying information previously submitted, in accordance with the procedures set forth in paragraph (i)(2) of this section.

(7) *Limitation on charges.* Except in the case of costs reimbursed under § 24.17(a)(14) of this part, Customs services provided to passengers arriving in the United States on scheduled airline flights (as defined in § 122.1(k) of this chapter and operating within the requirements of subpart D of part 122 of this chapter) shall be provided at no cost to airlines and airline passengers other than the fee specified in paragraph (g)(1) of this section.

(h) *Annual customs broker permit fee.* Customs brokers are subject to an annual fee for each permit held by an individual, partnership, association, or corporate broker as provided in § 111.96(c) of this chapter.

(i) *Fee remittance and information submission procedures.*

(1) *Fee remittance.* All fee payments required under this section shall be in the amounts prescribed and shall be made in U.S. currency, or by check or money order payable to the United States Customs Service, in accordance with the provisions of § 24.1 of this part. If payment is made by check or money order, the check or money order shall be annotated with the appropriate class code, as follows:

(i) Commercial vessels (other than barges and other bulk carriers from Canada or Mexico), 491;

(ii) Barges and other bulk carriers from Canada or Mexico, 498;

(iii) Commercial trucks, 492 for each individual arrival and 902 for any prepayment of the maximum calendar year fee;

(iv) Railroad cars, 493 for each individual arrival and 903 for any prepayment of the maximum calendar year fee;

(v) Private vessels, 904;

(vi) Private aircraft, 494;

(vii) Dutiable mail, 496;

(viii) Commercial vessel and commercial aircraft passengers, 495; and

(ix) Customs broker permits, 497.

Except as otherwise provided in this section, all fee payments not made at the time of arrival shall be mailed to: U.S. Customs Service, P.O. Box 198151, Atlanta, Georgia 30384. In addition to any information specified elsewhere in this section, each payment by mail shall be accompanied by information identifying the person or organization remitting the fee, the type of fee being remitted (for example, railroad car, commercial truck, private vessel), and the time period to which the payment applies.

(2) *Information submission.* Unless otherwise specified in this section, all information, summaries, reports, or other data required to be submitted to Customs under this section shall be mailed to the Director, National Finance Center, Attn: Revenue Branch, P.O. Box 68907, Indianapolis, Indiana 46268.

(j) *Treatment of fees as Customs duty.*

(1) *Administration and enforcement.* Unless otherwise specifically provided in this chapter, all administrative and enforcement provisions under the Customs laws and regulations, other than those laws and regulations relating to drawback, shall apply with respect to any fee provided for under this section, and with respect to any person liable for the payment of such fee, as if such fee is a Customs duty. For purposes of this paragraph, any penalty assessable in relation to an amount of Customs duty, whether or not any such duty is in fact due and payable, shall be assessed in the same manner with respect to any fee required to be paid under this section.

(2) *Jurisdiction.* For purposes of determining the jurisdiction of any court or agency of the United States, any fee provided for under this section shall be treated as if such fee is a Customs duty.

PART 111 – CUSTOMS BROKERS

1. The authority citation for Part 111 is amended by revising the specific authority citation for § 111.96 to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 8, Harmonized Tariff Schedule of the United States), 1624, 1641;

* * * * * * *

Section 111.96 also issued under 19 U.S.C. 58c, 31 U.S.C. 9701.

2. Section 111.96(c) is revised to read as follows:

§ 111.96 Fees.

* * * * * * *

(c) *User Fee.* An annual user fee of $125 will be assessed for each permit held by an individual, partnership, association, or corporate broker. The fee is payable for each calendar year in each district in which a broker has a permit to do business, shall be paid by the due date as published annually in the Federal Register, and shall be remitted in accordance with the procedures set forth in § 24.22(i) of this chapter. When a broker submits an application for a permit under § 111.19(b) of this part, the full $125 fee shall be remitted with the application regard-

less of the point during the calendar year at which the application is submitted. If a broker fails to pay the fee by the due date, the district director shall notify the broker in writing of the failure to pay and shall revoke the permit to operate. The notice will constitute revocation of the permit.

* * * * * * *

PART 122 – AIR COMMERCE REGULATIONS

1. The authority citation for Part 122 continues to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 58b, 66, 1433, 1436, 1459, 1590, 1594, 1623, 1624, 1644, 49 U.S.C. App. 1509.

2. Section 122.29 is amended by revising the section heading and the section text to read as follows:

§ 122.29 Arrival fee and overtime services.

Private aircraft may be subject to the payment of an arrival fee for services provided as set forth in § 24.22 of this chapter. For the procedures to be followed in requesting overtime services in connection with the arrival of private aircraft, see § 24.16 of this chapter.

PART 123 – CUSTOMS RELATIONS WITH CANADA AND MEXICO

1. The authority citation for Part 123 continues to read in part as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 8, Harmonized Tariff Schedule of the United States), 1624.

* * * * * * *

2. Section 123.0 is amended by adding a sentence at the end to read as follows:

§ 123.0 Scope.

* * * Fees for services provided in connection with the arrival of aircraft, vessels, vehicles and other conveyances from Canada or Mexico are set forth in § 24.22 of this chapter.

3. Section 123.1a is removed.

PART 145 – MAIL IMPORTATIONS

1. The authority citation for Part 145 continues to read in part as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 8, Harmonized Tariff Schedule of the United States), 1624.

* * * * * * *

2. Section 145.0 is amended by adding a sentence at the end to read as follows:

§ 145.0 Scope.

* * * The fee applicable to each item of dutiable mail for which Customs prepares documentation is set forth in § 24.22 of this chapter.

3. Section 145.1a is removed.

PART 178—APPROVAL OF INFORMATION COLLECTION REQUIREMENTS

1. The authority citation for Part 178 continues to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 1624, 44 U.S.C. 3501 *et seq.*

2. Section 178.2 is amended by removing the listings for sections 4.98(i), 123.1a, and 145.1a.

MICHAEL H. LANE,
Acting Commissioner of Customs.

Approved: October 4, 1993.
JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, October 21, 1993 (58 FR 54271)]

(T.D. 93–86)

SYNOPSES OF DRAWBACK DECISIONS

The following are synopses of drawback contracts approved February 19, 1993, to September 29, 1993, inclusive, pursuant to Subpart C, Part 191, Customs Regulations; and an approval under Treasury Decision 84–49.

In the synopses below are listed for each drawback contract approved under 19 U.S.C. 1313(b), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to manufacture or produce these articles, the factories where the work will be accomplished, the date the proposal was signed, the basis for determining payment, the Regional Commissioner to whom the contract was forwarded or approved by, and the date on which it was approved.

Dated: October 14, 1993.

WILLIAM G. ROSOFF,
(for John Durant, Director,
Commercial Rulings Division.)

(A) Company: Air Cargo Equipment Corp.
Articles: Aluminum pallet sheet and base sheet for aircraft
Merchandise: Aluminum alloy sheet
Factory: Rancho Dominguez, CA
Proposal signed: July 7, 1993
Basis of claim: Appearing in
Contract forwarded to RC of Customs: Long Beach, July 15, 1993

(B) Company: Alcan Aluminum Corp.
Articles: Copper powder; bronze premixes; bronze prealloys; brass prealloys; copper infiltrant powders
Merchandise: Fire refined copper ingots, briquettes, and powder
Factory: Union, NJ
Proposal signed: July 26, 1993
Basis of claim; Appearing in
Contract forwarded to RC of Customs: New York, August 11, 1993

(C) Company: Allied Colloids Inc.
Articles: Homopolymer (Percol 80L) and copolymers (Alcoflood, Alcomer, Alcoprint, Collafix, Filtaflok, Magnafloc, Percol, DP 2144 SP and DP9-5962)
Merchandise: Acrylamide 50% (ACM); dimethylaminoethyl methacrylate methyl chloride quaternary (DMAEMA MCQUAT); dimethylaminoethyl acrylate methyl chloride quaternary (DMAEA MCQUAT)
Factory: Suffolk, VA
Proposal signed: September 15, 1993
Basis of claim: Used in
Contract forwarded to RC of Customs: Miami, September 28, 1993

(D) Company: American Cyanamid Co.
Articles: Herbicides
Merchandise: Pyridine 2,3-dicarboxylic acid
Factory: South River, MO
Proposal signed: June 23, 1993
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, September 28, 1993

(E) Company: BP Marine Americas
Articles: Intermediate grade fuels
Merchandise: Residual fuel oil, Class I; distillate fuel oil, Class II
Factories: Gretna, LA; San Pedro & San Diego, CA; Port Newark, NJ; Deer Park, TX; Chesapeake, VA; Port Angeles, WA
Proposal signed: January 29, 1993
Basis of claim: Used in
Contract issued by RC of Customs in accordance with § 191.25(b)(2): Houston, February 19, 1993
Revokes: T.D. 93–62–E to cover a name change from BP North America Petroleum, Inc.

(F) Company: CPS Chemical Co., Inc.
Articles: Dimethylamine/Epichlorohydrin Copolymers (a/k/a Agefloc A-50, Agefloc A-50 HV, Agefloc B-50)
Merchandise: EpiChlorohydrin
Factory: West Memphis, AR
Proposal signed: February 22, 1993
Basis of claim: Used in
Contract forwarded to RC of Customs: Houston, September 29, 1993

(G) Company: Ciba-Geigy Corp.
Articles: Coal tar dyes in liquid and powder form
Merchandise: Tectilon Red 2B Cake (C.I. Acid Red #361)
Factory: Toms River, NJ
Proposal signed: June 11, 1993
Basis of claim: Used in
Contract forwarded ta RC of Customs: New York, July 30, 1993

(H) Company: Ciba-Geigy Corp.
Articles: 4,4-diamino stilbene 2,2-disulfonic acid in wetcake form
Merchandise: 4,4-dinitrostilbine-2,2-disulfonic acid (disodium salt)
Factory: McIntosh, AL
Proposal signed: April 14, 1993
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, September 7, 1993

(I) Company: Curtis Industries, Inc.
Articles: Key blanks
Merchandise: Strip brass (in coils)
Factory: Eastlake, OH
Proposal signed: March 31, 1992
Basis of claim: Used in, less valuable waste
Contract forwarded to RC of Customs: Chicago, September 29, 1993

(J) Company: E. I. du Pont de Nemours and Co.
Articles: MCPSI (an isocyanate); bensulfuron methyl (a/k/a F5384 technical); "Londax" herbicide formulations
Merchandise: J290-2 pyrimidinamine, 4,6 dimethoxy; ortho-toluic acid (OTA)
Factories: Belle, WV; El Paso, IL; Deepwater, NJ
Proposal signed: April 14, 1993
Basis of claim: Used in
Contract forwarded to RCs of Customs: New York & Boston, August 27, 1993

(K) Company: Eastman Kodak Co.
Articles: Various dyes in press cake, powder or paste form
Merchandise: 1,8 dichloroanthraquinone
Factory: Kingsport, TN
Proposal signed: December 11, 1992
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, July 23, 1993
Revokes: T.D. 91–86–C

(L) Company: Kelly-Springfield Tire Co.
Articles: Tires
Merchandise: Sponbax; phenax; pontax; olivax; tuax; vultax; code-72 (pig 72); code 567 a/k/a X50S; adamax
Factories: Tyler, TX; Freeport, IL; Fayetteville, NC
Proposal signed: July 12, 1993
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, July 19, 1993

(M) Company: Matsushita Electronic Components Corporation of America
Articles: Formed aluminum foil; aluminum electrolytic capacitors
Merchandise: Raw, etched & formed aluminum foil; separator papers; electrolytes; essence of electrolytes; aluminum slugs; adhesive tape; vinyl sleeve; lead wire; insulating board; various capacitor parts
Factory: Knoxville, TN
Proposal signed: June 3, 1993
Basis of claim: Appearing in
Contract forwarded to RC of Customs: New Orleans, September 14, 1993

(N) Company: Minnesota Mining and Manufacturing Co.
Articles: Fluoreolastomer products
Merchandise: Hexaflloropropane
Factory: Decatur, AL
Proposal signed: November 17, 1992
Basis of claim: Appearing in
Contract forwarded to RC of Customs: New Orleans, July 30, 1993

(O) Company: Monsanto Co.
Articles: Herbicides: Acetochlor Technical; Formulated Acetochlor (Harness); Safened Formulated Acetochlor (Guardian, Harness Plus)
Merchandise: 2-methyl-6-ethylaniline
Factory: Muscatine, IA
Proposal signed: January 16, 1993
Basis of claim: Appearing in
Contract forwarded to RC of Customs: Chicago, September 14, 1993

(P) Company: Nippondenso Manufacturing U.S.A., Inc.
Articles: Automotive components and parts
Merchandise: Copper radiator core strip; brass coil; seamless brass pipe; copper fin strip; zn diffused copper coil; brass tube strip; aluminum; resin; parts, components, sub-assemblies and assemblies
Factory: Battle Creek, MI
Proposal signed: May 17, 1993
Basis of claim: Appearing in
Contract forwarded to RC of Customs: Chicago, July 23, 1993

(Q) Company: Occidental Chemical Corp.
Articles: Vinyl chloride monomer (VCM)
Merchandise: Ethylene
Factory: Deer Park, TX
Proposal signed: September 21, 1992
Basis of claim: Appearing in
Contract forwarded to RC of Customs: Houston, September 21, 1993

(R) Company: Plasmine Technology, Inc.
Articles: Rosin sizing
Merchandise: Urea; pbstassium hydroxide; maleic anhydride; fumaric acid
Factories: Bay Minette, AL; Portland, ME
Proposal signed: April 26, 1993
Basis of claim: Appearing in
Contract forwarded to RC of Customs: New York, August 23, 1993

(S) Company: Signet Armorlite, Inc.
Articles: Plastic opthalmic lenses
Merchandise: SP-19 (Allylic monomer mixture); dibutyl maleate
Factories: San Marcos, CA (2)
Proposal signed: December 1, 1992
Basis of claim: Appearing in
Contract forwarded to RC of Customs: Long Beach (San Francisco Liquidation Unit), July 16, 1993

(T) Company: Solidur Plastics Co.
Articles: Compression molded polyethylene sheets
Merchandise: Ultra high molecular weight polyethylene resin
Factory: Delmont, PA
Proposal signed: March 8, 1993
Basis of claim: Appearing in
Contract forwarded to RC of Customs: New York, September 14, 1993

(U) Company: Springs Industries, Inc.
Articles: Woven fabric
Merchandise: Rayon staple fiber
Factory: Honea Path, SC
Proposal signed: March 31, 1993
Basis of claim: Used in
Contract forwarded to RC of Customs: Miami, September 28, 1993

(V) Company: Tropicana Products, Inc.
Articles: Orange and mixed fruit juice beverage
Merchandise: Concentrated orange juice for manufacturing
Factory: Bradenton, FL
Proposal signed: November 18, 1992
Basis of claim: Used in
Contract forwarded to RC of Customs: Miami, July 30, 1993

(W) Company: Union Camp Corp.
Articles: Uni-Rez 2656; Uni-Rez 2658
Merchandise: Dimer 14 tall oil fatty acid
Factory: Dover, OH
Proposal signed: March 30, 1993
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, July 16, 1993

(X) Company: Uniroyal Chomical Co., Inc.
Articles: B-NINE Technical or SP (plant growth regulators) [Butanoic acid mono (2,2-dimethyl hydrazide)]
Merchandise: Unsymmetrical dimethyl hydrazine (UDMH) a/k/a 1,1-dimethylhydrazine
Factory: Geismar, LA
Proposal signed: July 19, 1993
Basis of claim: Appearing in
Contract forwarded to RC of Customs: New York, September 14, 1993

(Y) Company: Vanchem, Inc.
Articles: Para-toluene sulfonyl isocyanate, crude & finished
Merchandise: Para-toluene sulfonamide
Factory: Lockport, NY
Proposal signed: September 14, 1993
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, September 28, 1993
Revokes: T.D. 93–62–W

(Z) Company: H. Wilson Manufacturing Co., Inc.
Articles: PA-50 AKA Mold Ban; AP-65 AKA Toxa Ban
Merchandise: Propionic acid in liquid form
Factory: Jefferson, GA
Proposal signed: July 28, 1992
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, August 13, 1993

APPROVAL UNDER T.D. 84–49

(1) Company: Mobil Oil Corp.
Articles: Petroleum products
Merchandise: Crude petroleum & petroleum derivatives
Factories: Beaumont, TX; Chalmette, LA; Channahon Township, IL; Paulsboro, NJ; Torrance, CA
Proposal signed: June 9, 1993
Basis of claim: As provided in T.D. 84–49
Contract forwarded to RC of Customs: Houston, September 3, 1993
Revokes: T.D. 92–88–1

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 93–195)

NSK LTD. AND NSK CORP., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND FEDERAL-MOGUL CORP. AND TORRINGTON CO., DEFENDANT-INTERVENORS

Court No. 93–08–00469

Plaintiffs move pursuant to Rule 56.2 of the Rules of this Court for partial judgment on the agency record as to Count IV of its complaint contesting the Department of Commerce, International Trade Administration's ("Commerce") treatment of direct selling expenses. Specifically, plaintiffs claim that such expenses should be added to foreign market value rather than deducted from United States price.

Held: Plaintiffs' motion for partial judgment on the agency record is granted and this case is remanded to Commerce to add direct selling expenses to foreign market value rather than deducting such expenses from United States price. Furthermore, pursuant to Rule 54(b) of the Rules of this Court, the Court orders that final judgment be entered on this issue.

[Plaintiffs' motion is granted; case remanded.]

(Dated October 8, 1993)

Coudert Brothers (Robert A. Lipstein, Matthew P. Jaffe, Nathan V. Holt and *Grace W. Lawson)* for plaintiffs.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Marc E. Montalbine);* of counsel: *Stephen J. Claeys,* Attorney-Advisor, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Frederick L. Ikenson, P.C. (Frederick L. Ikenson, Larry Hampel and *Joseph A. Perna V)* for defendant-intervenor Federal-Mogul Corporation.

Stewart and Stewart (Terence P. Stewart, James R. Cannon, Jr., John M. Breen, Geert De Prest, Myron A. Brilliant and *Margaret E.O. Edozien)* for defendant-intervenor The Torrington Company.

OPINION

TSOUCALAS, *Judge:* Plaintiffs move pursuant to Rule 56.2 of the Rules of this Court for partial judgment on the agency record as to Count IV of its complaint contesting the Department of Commerce, International Trade Administration's ("Commerce") treatment of direct selling expenses. Specifically, plaintiffs claim that such expenses should be added to foreign market value rather than deducted from United States price in *Final Results of Antidumping Duty Administrative Reviews and Revocation in Part of an Antidumping Duty Order ("Final Results")*, 58 Fed. Reg. 38,729 (1993), *as amended, Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the*

United Kingdom; Amendment to Final Results of Antidumping Duty Administrative Reviews, 58 Fed. Reg. 42,288 (1993).

BACKGROUND

On July 6, 1992, Commerce initiated an administrative review of antidumping duty orders covering antifriction bearings (other than tapered roller bearings) for the period May 1, 1991 through April 30, 1992. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof; Initiation of Antidumping Administrative Reviews and Request for Revocation of Order (in Part),* 57 Fed. Reg. 29,700 (1992). NSK participated in this review. *Id.*

On April 27, 1993, Commerce published its preliminary determination in the administrative review. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Japan; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews,* 58 Fed. Reg. 25,616 (1993).

On July 26, 1993, Commerce published its Final Results in this proceeding in which Commerce decided to deduct direct selling expenses from United States price rather than adding such expenses to foreign market value. *Final Results,* 58 Fed. Reg. at 39,778. NSK claims that this was not in accordance with law. On August 19, 1993, the Court issued a scheduling order expediting the filing of briefs on Count IV of plaintiffs' complaint so that this issue would be decided and the parties would have the opportunity to appeal prior to it becoming moot by a superseding administrative review.

DISCUSSION

Plaintiffs claim that the direct selling expenses at issue should be added to foreign market value rather than deducted from United States price.

According to 19 U.S.C. § 1677a(e) (1988), "the exporter's sale price shall be adjusted by being reduced by the amount, if any, of * * * expenses generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise."

The Court of Appeals, however, has interpreted section 1677a(e) to refer to indirect rather than direct selling expenses. *Consumer Prods. Div. SCM Corp. v. Silver Reed America,* 753 F.2d 1033, 1036–38 (Fed. Cir. 1985).

This issue has unnecessarily consumed the Court's time in recent decisions and the Court has consistently held that "direct selling expenses are properly characterized as differences in circumstances of sale giving rise to an adjustment of FMV." *NSK Ltd. v. United States,* 17 CIT ____, ____, Slip Op. 93–50 at 6 (April 2, 1993); *NTN Bearing Corp. of America v. United States,* 17 CIT ____, ____, Slip Op. 93–51 at 4 (April 13, 1993); *NTN Bearing Corp. of America v. United States,* 17 CIT ____, ____, Slip Op. 93–56 at 4 (April 21, 1993); *NSK Ltd. v. United States,* 17 CIT ____, ____, Slip Op. 93–92 at 3 (June 3, 1993); *NTN Bearing Corp. of*

America v. United States, 14 CIT 623, 637, 747 F. Supp. 726, 738–39 (1990); *Timken Co. v. United States*, 11 CIT 786, 800, 673 F. Supp. 495, 509 (1987).

Although the law is clear, on this issue, "Commerce repeatedly ignores the law and disobeys the decisions of this Court." *NSK Ltd.*, 17 CIT at ____, Slip Op. 93–50 at 6–7. Furthermore, the Court recently cautioned Commerce that "they are to adhere to the law and to the decisions of the Court on this issue. If not, this Court will be compelled to order sanctions against the government and hold Commerce in contempt of court for repeatedly ignoring the well-established law." *Id.* at ____, Slip Op. 93–50 at 7.

Absent any contrary authority, this Court adheres to the abundance of case law on this issue and, therefore, this case is remanded to Commerce to add direct selling expenses to foreign market value rather than deducting such from United States price.

Plaintiffs also claim that Commerce has sought to evade the effect of the Court's decisions by arbitrarily reclassifying certain direct selling expenses as price adjustments for which no adjustment is made to foreign market value. *Plaintiffs' Motion for Judgment on the Agency Record as to Count IV of the Complaint* at 12. Plaintiffs further claim that Commerce offers no reasoned basis for the reclassification of these expenses and that they should be ordered by the Court, on remand, to eliminate "price adjustments" in the final results for NSK and correctly classify the relevant expenses as direct selling expenses. *Id.* at 13.

Commerce claims that this issue is not properly subject to expedited review and that the precise issue, which the parties and this Court agreed should be handled in an expedited manner, was whether Commerce could deduct direct selling expenses from United States price. *Defendant's Memorandum in Opposition to Plaintiffs' Motion for Judgment Upon the Agency Record* at 17. The Court permitted expedited review in this case to (1) allow the Court to rule upon Commerce's deduction of direct selling expenses from exporter's sales price transactions in this review before new deposit rates were established by a subsequent administrative review, and (2) permit any party aggrieved by the Court's decision to appeal the matter to the Court of Appeals before the establishment of new deposit rates renders this issue moot. To include this incidental issue in the expedited review would only complicate this action. Therefore, the parties should raise this issue in their subsequent briefs which will address all other issues in this case.

Conclusion

In accordance with the foregoing opinion, plaintiffs' motion for partial judgment on the agency record is hereby granted and this case is remanded to Commerce to add direct selling expenses to foreign market value rather than deducting such expenses from United States price. Furthermore, pursuant to Rule 54(b) of the Rules of this Court, the Court orders that final judgment be entered on this issue so that parties may file an immediate appeal.

(Slip Op. 93–196)

RHP BEARINGS, ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND FEDERAL-MOGUL CORP. AND TORRINGTON CO., DEFENDANT-INTERVENORS

Court No. 93–08–00470

Plaintiffs move pursuant to Rule 56.2 of the Rules of this Court for partial judgment on the agency record as to Count I of its complaint contesting the Department of Commerce, International Trade Administration's ("Commerce") treatment of direct selling expenses. Specifically, plaintiffs claim that such expenses should be added to foreign market value rather than deducted from United States price.

Held: Plaintiffs' motion for partial judgment on the agency record is granted and this case is remanded to Commerce to add direct selling expenses to foreign market value rather than deducting such expenses from United States price. Furthermore, pursuant to Rule 54(b) of the Rules of this Court, the Court orders that final judgment be entered on this issue.

[Plaintiffs' motion is granted; case remanded.]

(Dated October 8, 1993)

Covington & Burling (Harvey M. Applebaum, David R. Grace, and *Mark F. Kightlinger)* for plaintiffs.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Marc E. Montalbine);* of counsel: *Stephen J. Claeys,* Attorney-Advisor, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Frederick L. Ikenson, P.C. (Frederick L. Ikenson, Larry Hampel and *Joseph A. Perna, V)* for defendant-intervenor Federal-Mogul Corporation.

Stewart and Stewart (Terence P. Stewart, Wesley K. Caine, Geert De Prest, Myron A. Brilliant and *Margaret E.O. Edozien)* for defendant-intervenor The Torrington Company.

OPINION

TSOUCALAS, *Judge:* Plaintiffs move pursuant to Rule 56.2 of the Rules of this Court for partial judgment on the agency record as to Count I of its complaint contesting the Department of Commerce, International Trade Administration's ("Commerce") treatment of direct selling expenses. Specifically, plaintiffs claim that such expenses should be added to foreign market value rather than deducted from United States price in *Final Results of Antidumping Duty Administrative Reviews and Revocation in Part of an Antidumping Duty Order ("Final Results"),* 58 Fed. Reg. 38,729 (1993), *as amended, Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom; Amendment to Final Results of Antidumping Duty Administrative Reviews,* 58 Fed. Reg. 42,288 (1993).

BACKGROUND

On July 6, 1992, Commerce initiated an administrative review of antidumping duty orders covering antifriction bearings (other than tapered roller bearings) for the period May 1, 1991 through April 30, 1992. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts*

Thereof; Initiation of Antidumping Administrative Reviews and Request for Revocation of Order (in Part), 57 Fed. Reg. 29,700 (1992). RHP participated in this review. *Id.*

On April 27, 1993, Commerce published its preliminary determination in the administrative review. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Japan; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews,* 58 Fed. Reg. 25,616 (1993)

On July 26, 1993, Commerce published its Final Results in this proceeding in which Commerce decided to deduct direct selling expenses from United States price rather than adding such expenses to foreign market value. *Final Results,* 58 Fed. Reg. at 39,778. RHP claims that this was not in accordance with law. On August 19, 1993, the Court issued a scheduling order expediting the filing of briefs on Count I of plaintiffs' complaint so that this issue would be decided and the parties would have the opportunity to appeal prior to it becoming moot by a superseding administrative review.

DISCUSSION

Plaintiffs claim that the direct selling expenses at issue should be added to foreign market value rather than deducted from United States price.

According to 19 U.S.C. § 1677a(e) (1988), "the exporter's sale price shall be adjusted by being reduced by the amount, if any, of * * * expenses generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise."

The Court of Appeals, however, has interpreted section 1677a(e) to refer to indirect rather than direct selling expenses. *Consumer Prods. Div., SCM Corp. v. Silver Reed America,* 753 F.2d 1033, 1036–38 (Fed. Cir. 1985).

This issue has unnecessarily consumed the Court's time in recent decisions and the Court has consistently held that "direct selling expenses are properly characterized as differences in circumstances of sale giving rise to an adjustment of FMV." *NSK Ltd. v. United States,* 17 CIT ___, ___, Slip Op. 93–50 at 6 (April 2, 1993); *NTN Bearing Corp. of America v. United States,* 17 CIT ___, ___, Slip Op. 93–51 at 4 (April 13, 1993); *NTN Bearing Corp. of America v. United States,* 17 CIT ___, ___, Slip Op. 93–56 at 4 (April 21, 1993); *NSK Ltd. v. United States,* 17 CIT ___, ___, Slip Op. 93–92 at 3 (June 3, 1993); *NTN Bearing Corp. of America v. United States,* 14 CIT 623, 637, 747 F. Supp. 726, 738–39 (1990); *Timken Co. v. United States,* 11 CIT 786, 800, 673 F. Supp. 495, 509 (1987).

Although the law is clear on this issue, "Commerce repeatedly ignores the law and disobeys the decisions of this Court." *NSK Ltd.,* 17 CIT at ___, Slip Op. 93–50 at 6–7. Furthermore, the Court recently cautioned Commerce that "they are to adhere to the law and to the decisions of the Court on this issue. If not, this Court will be compelled to order sanc-

tions against the government and hold Commerce in contempt of court for repeatedly ignoring the well-established law." *Id.* at ____, Slip Op. 93–50 at 7.

Absent any contrary authority, this Court adheres to the abundance of case law on this issue and, therefore, this case is remanded to Commerce to add direct selling expenses to foreign market value rather than deducting such from United States price.

CONCLUSION

In accordance with the foregoing opinion, plaintiffs' motion for partial judgment on the agency record is hereby granted and this case is remanded to Commerce to add direct selling expenses to foreign market value rather than deducting such expenses from United States price. Furthermore, pursuant to Rule 54(b) of the Rules of this Court, the Court orders that final judgment be entered on this issue so that parties may file an immediate appeal.

(Slip Op. 93–197)

FEDERAL-MOGUL CORP., PLAINTIFF AND PLAINTIFF-INTERVENOR AND TORRINGTON CO., PLAINTIFF AND PLAINTIFF-INTERVENOR *v.* UNITED STATES, DEFENDANT, AND NTN BEARING CORP. OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORP., NTN CORP., KOYO SEIKO CO., LTD., KOYO CORP. OF U.S.A., PEER BEARING CO., NSK LTD., NSK CORP., CATERPILLAR INC., MINEBEA CO., LTD., AND NMB CORP., DEFENDANT-INTERVENORS

Consolidated Court No. 91–07–00530 and 91–08–00569

Defendant-intervenors, Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. ("Koyo"), move pursuant to Rule 7 of the Rules of this Court for clarification and modification of the remand order accompanying *Federal-Mogul Corp. v. United States*, 17 CIT ____, Slip Op. 93–180 (September 14, 1993).

Held: Koyo's motion for clarification and modification is granted in part and Slip Op. 93–180 is clarified herein. Koyo's motion is denied in part because Koyo fully participated in the presentation of this issue to the Court.

[Motion granted in part and denied in part.]

(Dated October 8, 1993)

Frederick L. Ikenson, P.C. (Frederick L. Ikenson, J. Eric Nissley, Joseph A. Perna, V and *Larry Hampel)* for plaintiff and plaintiff-intervenor Federal-Mogul Corporation.

Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., Wesley K. Caine, Christopher J. Callahan, John M. Breen, Geert De Prest, Margaret E.O. Edozien, Lane S. Hurewitz, Patrick J. McDonough, Robert A. Weaver and *Amy S. Dwyer)* for plaintiff and plaintiff-intervenor The Torrington Company.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Velta A. Melnbrencis* and *Jane E. Meehan)*; of counsel: *John D. McInerney*, Acting Deputy Chief Counsel for Import Administration, *Dean A. Pinkert, Stephen J. Claeys* and *Craig R. Giesze*, Attorney-Advisors, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Powell, Goldstein, Frazer & Murphy (Peter O. Suchman, Neil R. Ellis, Susan E. Silver and *Niall P. Meagher)* for defendant-intervenors Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A.

Barnes, Richardson & Colburn (Robert E. Burke, Donald J. Unger, Kazumune V. Kano and *Diane A. MacDonald)* for defendant-intervenors NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation and NTN Corporation.

Coudert Brothers (Robert A. Lipstein, Matthew P. Jaffe and *Nathan V. Holt)* for defendant-intervenors NSK Ltd. and NSK Corporation.

Venable, Baetjer, Howard & Civiletti (John M. Gurley, John C. Dibble and *Lindsay B. Meyer)* for defendant-intervenor Peer Bearing Company.

Powell, Goldstein, Frazer & Murphy (Richard M. Belanger, Neil R. Ellis and *D. Christine Wood)* for defendant-intervenor Caterpillar Inc.

Arent Fox Kintner Plotkin and Kahn (Michele N. Tanaka and *Peter Sultan)* for defendant-intervenor Minebea Co., Ltd. and NMB Corporation.

OPINION

TSOUCALAS, *Judge:* Defendant-intervenors, Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. ("Koyo"), move pursuant of Rule 7 of the Rules of this Court for clarification and modification of the Order remanding this case to the Department of Commerce, International Trade Administration ("ITA") which accompanied *Federal-Mogul Corp. v. United States,* 17 CIT ____, Slip Op. 93–180 (September 14, 1993). *Motion to Clarify and Amend Order ("Koyo's Motion")*

The Order accompanying Slip Op. 93–180 remanded this case to the ITA

> to allow the ITA to determine if JBIA inspection certificates provided evidence that respondents knew, or should have known, that sales to Japanese original equipment manufacturers ("OEMs") with U.S. affiliates were destined for the U.S. market and if the ITA finds that respondents knew, or should have known, that sales to Japanese OEMs with U.S. affiliates were destined for the U.S. market, the ITA will disregard those sales in calculating foreign market value; * * *.

Order accompanying Slip Op. 93–180 (September 14, 1993).

Koyo argues that, in regard to Koyo, this issue was previously disposed of in *Torrington Co. v. United States,* 17 CIT ____, 818 F. Supp. 1563 (1993). Koyo argues that it filed a motion for partial judgment on the agency record pursuant to Rule 56.1 of the Rules of this Court on February 24, 1992 which requested judgment on all issues relating to Koyo contained in The Torrington Company's ("Torrington") complaint in Court No. 91–08–00569,[1] including Count 4 which addressed whether respondents knew, or should have known, that certain home market sales were destined for the U.S. market. *See Motion of Defendant-Intervenors Koyo Seiko Company, Ltd. and Koyo Corporation of U.S.A. for Judgment on the Agency Record* (February 24, 1992). Koyo argues that *Torrington,* 17 CIT ____, 818 F. Supp. 1563, decided all issues raised in Koyo's motion for partial judgment. *Koyo's Motion* at 2, 4–5.

[1] Court No. 91–08–00569 was consolidated with Court No. 91–07–00530 by order of this Court dated April 14, 1993.

On April 13, 1992, this Court issued a Scheduling Order in Court No. 91–07–00530 which stated in pertinent part:

> *Phase One:*
> Plaintiff and plaintiff-intervenor's response briefs to defendant-intervenor Koyo Seiko Company, Ltd. and Koyo Corporation of U.S.A.'s (collectively "Koyo") February 24, 1992 motion for judgment on the agency record is due 30 days after the entry of this order,
>
> * * * * * * *
>
> *Phase Two:*
> Within 90 days of the entry of this order, plaintiff and plaintiff-intervenor in the above-captioned cases shall file and serve their principal briefs pursuant to Rule 56.1 concerning these issues:
> 1. Reporting of Home Market and US Sales
> (Count 4 in 91–08–00569)

Scheduling Order dated April 13, 1992 (entered in Court No. 91–07–00530 and applicable to Court No. 91–08–00569). Koyo argues that this Order required the parties to address Count 4 of Torrington's complaint in regard to Koyo during Phase One and that the parties failed to do so. Therefore, Koyo argues that Torrington abandoned this issue in regard to Koyo. *Koyo's Motion* at 3–5.

Torrington opposes Koyo's motion arguing that, in good faith, it interpreted this Court's April 13, 1992 Scheduling Order as requiring the parties to address Count 4 of its complaint, including the application of, Count 4 to Koyo, during Phase Two of these proceedings. Torrington points out that, in replying to Koyo's motion for partial judgment during Phase One, it explicitly abandoned Counts 8 and 11 of its complaint in regard to Koyo, but did not do so for Count 4. *Opposition of The Torrington Company to Motion for Clarification and Amendment of Slip Op. 93–180 ("Torrington's Opposition")* at 2–3; *see Plaintiff's Response to Defendant-Intervenors' Motion for Judgment on the Agency Record* at 2 n.2 (May 13, 1992).

In addition, Torrington points out that this Court's decision in *Torrington*, 17 CIT ____, 818 F. Supp. 1563, did not address Count 4 of Torrington's complaint. In fact, the only decision on this issue is Slip Op. 93–180 which deals with Phase Two issues and which is the Slip Opinion which Koyo seeks to have modified. *Torrington's Opposition* at 3.

Finally, Torrington argues that Koyo's motion amounts to a request for dismissal of Count 4 as to Koyo's imports but that dismissal is a drastic remedy whose use is not warranted by the facts of this case. *Id.* at 4 *(citing e.g., Pardee v. Stock,* 712 F.2d 1290 (8th Cir. 1983)).

Defendant agrees with Torrington's arguments on this issue and points out that it too interpreted the Scheduling Order in this case as requiring that Count 4 be addressed in Phase Two. *Defendant's Opposition to Motion of Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. to Clarify and Amend Order.*

It is clear that there was confusion over the correct interpretation of this Court's Scheduling Order in this case. Nevertheless, Koyo had the opportunity to fully brief this issue. *See Memorandum of Points and Authorities in Support of Defendant-Intervenors' Motion for Judgment on the Agency Record* (February 24, 1992). The facts as presented here do not warrant a finding that Torrington abandoned this issue in regard to Koyo. In addition, there is nothing in this Court's opinion in *Torrington*, 17 CIT ___, 818 F. Supp. 1563, or in *Federal-Mogul*, 17 CIT ___, Slip Op. 93–180, which would lead this Court to conclude that Koyo was excluded from the Court's remand Order on this issue. The Order remanding this case to the ITA speaks of investigating whether "*respondents* knew, or should have known, that sales to Japanese OEMs with U.S. affiliates were destined for the U.S. market * * *." Order accompanying Slip Op. 93–180. Koyo was a respondent.

Therefore, Koyo's motion to clarify and amend Slip Op. 93–180 is granted in part insofar as Slip Op. 93–180 is clarified to make clear that the Order of remand accompanying Slip Op. 93–180 does cover Koyo. Koyo's motion to amend is denied.

(Slip Op. 93–198)

TORRINGTON CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND NMB THAI LTD., PELMEC THAI LTD., AND NMB CORP., DEFENDANT-INTERVENORS

Court No. 91–08–00564

Plaintiff challenges the Department of Commerce, International Trade Administration's ("ITA") treatment of Thailand's indirect business and municipal taxes in the ITA's redetermination on remand filed pursuant to *Torrington Co. v. United States*, 17 CIT ___, 823 F. Supp. 945 (1993).

Held: Final judgment is entered ordering the ITA to apply Thailand's indirect business and municipal tax rates to the United States price calculated at the same point in the stream of commerce as where Thailand's tax authorities apply these rates on home market sales and add the resulting amount to United States price.

[Final judgment entered. Case dismissed.]

(Dated October 8, 1993)

Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., Geert De Prest, Margaret E. O. Edozien, Margaret L.H. Png, Lane S. Hurewitz, Julie Chasen Ross and *Robert A. Weaver)* for plaintiff The Torrington Company.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Velta A. Melnbrencis* and *Jane E. Meehan);* of counsel: *John D. McInerny*, Acting Deputy Chief Counsel for Import Administration, *Alicia Greenidge, Dean A. Pinkert, Craig R. Giesze* and *Stacy J. Ettinger*, Attorney-Advisors, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Arent Fox Kintner Plotkin and Kahn (Michele N. Tanaka and *Peter Sultan)* for defendant-intervenors NMB Thai Ltd., Pelmec Thai Ltd. and NMB Corporation.

OPINION

TSOUCALAS, *Judge:* Plaintiff, The Torrington Company ("Torrington"), commenced this action to challenge certain aspects of the Depart-

ment of Commerce, International Trade Administration's ("ITA") final results in the first administrative review of imports of antifriction bearings from Thailand. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Thailand; Final Results of Antidumping Duty Administrative Review,* 56 Fed. Reg. 31,765 (1991). Substantive issues raised by the parties in the underlying administrative proceeding were addressed by the ITA in the issues appendix to *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany; Final Results of Antidumping Duty Administrative Review ("Issues Appendix"),* 56 Fed. Reg. 31,692 (1991).

BACKGROUND

In *Torrington Co. v. United States,* 17 CIT ____, 823 F. Supp.945, 949 (1993), this Court remanded this case "to the ITA to add the full amount of [indirect taxes] paid on each sale in the home market to [foreign market value] without adjustment."

On July 22, 1993, the ITA filed with this Court its Final Results of Redetermination Pursuant to Court Remand, *The Torrington Company v. United States* Slip Op. 93–98 (June 8, 1993) *("Remand Results").* Since there was no value added tax ("VAT") in Thailand at the time of the underlying administrative review but there were business and municipal taxes which were not collected by reason of the export of the subject merchandise to the U.S., in its Remand Results the ITA stated that it would add the amount of these indirect taxes to foreign market value ("FMV") for sales in the home market without adjustment and also added the exact same amount to United States price ("USP"). *Remand Results* at 3. ITA did not implement its stated methodology because it would only change cash deposit rates which are no longer in effect. *Id.* at 3–4.

DISCUSSION

ITA's final results filed pursuant to a remand will be sustained unless that determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938); *Alhambra Foundry Co. v. United States,* 12 CIT 343, 345, 685 F. Supp. 1252, 1255 (1988).

Torrington challenges the ITA's treatment of Thailand's indirect business and municipal taxes. *Memorandum of The Torrington Company in Support of its Motion for a Second Remand ("Torrington's Memorandum")* at 2–8.[1]

In its Remand Results, as instructed by this Court, the ITA articulated its new methodology for dealing with indirect taxes which involves

[1] Although Torrington challenges the ITA's treatment of value added taxes, its arguments also apply to the other types of indirect taxes present in this case.

adding the amount of indirect taxes paid on each sale in the home market to FMV without making a circumstance of sale ("COS") adjustment to this amount. In addition and on its own initiative, the ITA will add the exact same amount to USP instead of following its usual practice of applying the *ad valorem* tax rate to the net USP after all adjustments have been made and adding this amount to USP. *Remand Results* at 3; *see Issues Appendix,* 56 Fed. Reg. at 31,729. ITA's rationale for its new approach is based on its interpretation of the United States Court of Appeals for the Federal Circuit's recent opinion on the VAT issue in *Zenith Elecs. Corp. v. United States,* 988 F.2d 1573, 1580–82 (1993). *Remand Results* at 2.

Defendant argues that the ITA's new methodology is in accord with *Zenith,* 988 F.2d at 1580–82. The court in *Zenith* held that the ITA was not allowed to make a COS adjustment to FMV to achieve tax neutrality by eliminating the so-called multiplier effect of 19 U.S.C. § 1677a(d)(1)(C) (1988).[2] The court reasoned that 19 U.S.C. § 1677a(d)(1)(C) is the sole provision of the antidumping duty statute that deals with the treatment of VATs or indirect taxes. As a result, 19 U.S.C. § 1677b(a)(4)(B) (1988), which allows adjustments to FMV for differences in circumstances of sale, does not apply and cannot be used to achieve tax neutrality. *Zenith,* 988 F.2d at 1580–82.

The court also stated that:

> By engaging in dumping, the exporters themselves are responsible for the multiplier effect. The multiplier effect does not create a dumping margin where one does not already exist. Only when pre-tax FMV exceeds USP and a foreign nation assesses an ad valorem domestic commodity tax does section 1677a(d)(1)(C) operate to accentuate the dumping margin. Without a dumping margin (when pretax FMV equals [or is less than] USP), even assessment of an *ad valorem* tax creates no multiplier effect. The multiplier effect thus occurs only when a dumping margin already exists. If a foreign manufacturer does not export its wares at less than fair

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[2] 19 U.S.C. § 1617a(d)(1)(C) states:

> **(d) Adjustments to purchase price and exporter's sales price**
> The purchase price and the exporter's sales price shall be adjusted by being–
> (1) increased by–
> * * * * * * *
> (C) the amount of any taxes imposed in the country of exportation directly upon the exported merchandise, or components thereof, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States, but only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation; * * *.

The multiplier effect can be seen in the following example taken from *Zenith Elecs. Corp. v. United States,* 10 CIT 268, 273 n.9, 633 F. Supp. 1382, 1386 n.9 (1986), *appeal dismissed,* 875 F.2d 291 (Fed. Cir. 1989):

> Suppose the pre-tax home market price for a certain model of Japanese television is equal to $100, while the purchase price for the same model when sold for export to the United States is $90. In this tax-free comparison, the absolute margin of dumping would be $10 ($100–$90) and the *ad valorem* margin would be 11.1% ($10/$90).
> Since the Japanese commodity tax is 15%, the tax on the home market sale equals $15 (15% of $100). If we assume that this tax is fully shifted forward to the home market purchaser, then the after-tax home market price equals $115. By contrast, the amount of tax rebated or not collected on the exported television because it was sold for export would equal only $13.50 (15% of $90). Hence, if the United States price were increased by this latter amount, in accordance with the terms of 19 U.S.C. 1677a(d)(1)(C), the adjusted calculation of USP would be $103.50 ($90 + $13.50). The absolute margin, determined by subtracting the adjusted USP from the after-tax home market price, would be $11.50 ($115–$103.50), an amount greater than the $10 absolute margin calculated in the tax-free comparison, above. The *ad valorem* margin, however, would be identical, at 11.1% ($11.50/$103.50).

> value, it will not suffer disadvantage from the operation of section 1677a(d)(1)(C).
>
> Moreover, the enactment history of section 1677a(d)(1)(C) does not suggest that Congress sought tax neutrality when it fashioned the adjustment provision.

Zenith, 988 F.2d at 1581–82. It is clear from this statement that tax neutrality is irrelevant to the proper application of 19 U.S.C. § 1677a(d)(1)(C). *See also Federal-Mogul Corp. v. United States*, 17 CIT ____, ____, 813 F. Supp. 856, 864–65.

Defendant argues that the court in *Zenith* only decided that the ITA could not make a COS adjustment to FMV to obtain tax neutrality. Defendant argues that the court's decision does not mean that the ITA cannot adopt an interpretation of the statute which would result in tax neutrality. Defendant states that its position is affirmed by footnote 4 in *Zenith* which states:

> The statute by its express terms allows adjustment of USP in the *amount* of taxes on the merchandise sold in the country of exportation. While perhaps cumbersome, Commerce may eliminate the multiplier effect by adjusting USP by the amount, instead of the rate, of the *ad valorem* tax.

988 F.2d at 1582 n.4 (emphasis in original); *Defendant's Opposition to Motion of The Torrington Company for Second Remand ("Defendant's Opposition")* at 3–8.

Defendant argues that there are two valid interpretations of the statutory language in regard "to whether the tax to be added to USP is (1) the tax that would have been charged on the exported merchandise, had the foreign country taxed exports; or (2) the tax that would have been charged on the exported merchandise, had it been sold in the foreign market." *Defendant's Opposition* at 6. ITA has chosen the second interpretation and defendant argues that this interpretation is entitled to substantial deference citing *Chevron v. Natural Resources Def. Council*, 467 U.S. 837 (1984). *Defendant's Opposition* at 6.

Torrington argues that footnote 4 in *Zenith* is merely dicta and not the holding of the Court of Appeals on this issue. *Torrington's Memorandum* at 6–7.

In addition, Torrington argues that footnote 4 is an inaccurate statement of the law. Torrington argues that 19 U.S.C. § 1677a(d)(1)(C) states that "the amount of any taxes imposed in the country of exportation directly upon the *exported merchandise* * * * which have been rebated or which have not been collected, by reason of the exportation * * *." must be added to USP. *Torrington's Memorandum* at 6–7 (emphasis in original). Nowhere does the statute discuss using the amount of tax paid on home market sales.

This Court remanded this issue for the ITA "to add the full amount of [indirect taxes] paid in the home market to FMV without adjustment * * *." *Torrington*, 17 CIT at ____, 823 F. Supp. at 949. Nowhere did this Court discuss changing the ITA's method of adding an amount to USP

pursuant to 19 U.S.C. § 1677a(d)(1)(C) to account for Thailand's indirect taxes. In fact, this Court implicitly affirmed the ITA's methodology for adjusting USP in its discussion of the tax base issue in *Federal-Mogul*, 17 CIT at ___, 813 F. Supp. at 865–66.

Defendant relies on *Zenith* to support its position. Although the ITA's Remand Results do not explicitly cite to footnote 4, this is the ITA's primary support for its mistaken belief that its new indirect tax methodology is not in conflict with the body of the *Zenith* opinion and the language of the statute. *Defendant's Opposition* at 4–6. However, this Court finds that footnote 4 is clearly at odds with the body of *Zenith* and the language of the statute and is dicta.

The court in *Zenith* states that "[t]itle 19 explicitly requires Commerce to increase USP by the amount of tax that the exporting country *would have assessed on the merchandise if it had been sold in the home market.*" 988 F.2d at 1580 (emphasis added). It is clear from this statement, as well as the language of the statute itself, that the sale price to which the indirect tax rate is to be applied is the USP calculated at the same point in the chain of commerce as where Thailand's tax authorities apply Thailand's indirect tax rate to home market sales. For example, if when taxing home market sales, Thailand's tax authorities apply Thailand's indirect tax rate to an ex-factory price to calculate the amount of tax due, the ITA is required to apply Thailand's indirect tax rate to an ex-factory USP and add the resulting amount to USP. 19 U.S.C. § 1677a(d)(1)(C).

Support for this position is provided by the Court of Appeals for the Federal Circuit's recent decision on the tax base issue in *Daewoo Elecs. Co. v. United States*, Nos. 92–1558, –1559, –1560, –1561, –1562 (Fed. Cir. Sept. 30, 1993). The court in *Daewoo* stated that 19 U.S.C. § 1677a(d)(1)(C)

> mandates a calculation of imputed tax amounts to be added to the USP, *but does not specify to which USP the Korean taxes are to be applied as the product moves to the consumer.* This determination is important because the Korean taxes are not a specific amount, but instead ad valorem in nature; and it is difficult because the question is a hypothetical. *The Korean taxes must be applied to sales of goods at some discrete moment in the stream of commerce with or in the United States. a different market from that in which the taxes should be levied, but are not, because of exportation.*

Daewoo, Nos. 92–1558, –1559, –1560, –1561, –1562 at 18–19 (emphasis added). In the *Daewoo* case, the ITA determined that evidence on the administrative record showed that the Korean tax authorities applied their *ad valorem* taxes to "the net price of the delivered televisions receivers to unrelated dealers." *Id.* at 19. Therefore, the ITA applied the Korean tax rate to the comparable USP, *i.e.*, the price to the first unrelated purchaser. *Id.* at 19–20. The court went on to affirm the ITA's methodology of determining where in the stream of commerce the Korean authorities applied the *ad valorem* tax rate in the home market and

applying the same tax rate to USP calculated at the same point in the chain of commerce and adding this amount to USP. *Id.* at 18–22.

Therefore, since as a matter of law the ITA has incorrectly adjusted USP for Thailand's indirect tax rate, and since there is no just reason for delay in the entry of final judgment on this issue, this Court is entering final judgment on this issue ordering the ITA to apply Thailand's indirect tax rate to USP calculated at the same point in the stream of commerce where Thailand's tax authorities apply indirect taxes on home market sales and add the resulting amount to USP. This case is dismissed.

(Slip Op. 93–199)

TORRINGTON CORP., PLAINTIFF, AND FEDERAL-MOGUL CORP., PLAINTIFF-INTERVENOR *v.* UNITED STATES, DEFENDANT, AND SKF USA INC. AND SKF (U.K.) LTD., DEFENDANT-INTERVENORS

Court No. 91–08–00570

Plaintiff and plaintiff-intervenor challenge the Department of Commerce, International Trade Administration's ("ITA") treatment of the United Kingdom's value added tax ("VAT") in the ITA's redetermination on remand filed pursuant to *Torrington Co. v. United States*, 17 CIT ___, 824 F. Supp. 1095 (1993).

Held: Final judgment is entered ordering the ITA to apply the United Kingdom's VAT rate to the United States price calculated at the same point in the stream of commerce where the United Kingdom's tax authorities apply this rate on home market sales and add the resulting amount to United States price.

[Final judgment entered. Case dismissed.]

(Dated October 14, 1993)

Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., Geert De Prest, Margaret E. O. Edozien, William A. Fennell, Wesley K. Caine, Myron A. Brilliant, Robert A. Weaver and *Amy S. Dwyer)* for plaintiff.

Frederick L. Ikenson, P.C. (Frederick L. Ikenson, J. Eric Nissley, Larry Hampel and *Joseph A. Perna V)* for plaintiff-intervenor Federal-Mogul Corporation.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Velta A. Melnbrencis* and *Jane E. Meehan);* of counsel: *John D. McInerney,* Acting Deputy Chief Counsel for Import Administration, *Dean A. Pinkert* and *Stephen J. Claeys,* Attorney-Advisors, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Howrey & Simon (Herbert C. Shelley, Scott A. Scheele, Alice A. Kipel, Thomas J. Trendl, Anne Talbot and *Juliana M. Cofrancesco)* for defendant-intervenors SKF USA Inc. and SKF (U.K.) Limited.

OPINION

TSOUCALAS, *Judge:* Plaintiff, The Torrington Company ("Torrington"), and plaintiff-intervenor, Federal-Mogul Corporation ("Federal-Mogul"), commenced this action to challenge certain aspects of

the Department of Commerce, International Trade Administration's ("ITA") final results in the first administrative review of imports of antifriction bearings from the United Kingdom. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the United Kingdom; Final Results of Antidumping Duty Administrative Reviews,* 56 Fed. Reg. 31,769 (1991). Substantive issues raised by the parties in the underlying administrative proceeding were addressed by the ITA in the issues appendix to *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany; Final Results of Antidumping Duty Administrative Review ("Issues Appendix"),* 56 Fed. Reg. 31,692 (1991).

BACKGROUND

In *Torrington Co. v. United States,* 17 CIT ___, ___, 824 F. Supp. 1095, 1101 (1993), this Court remanded this case to the ITA to "add the full amount of [value added tax] paid on each sale in the home market to [foreign market value] without adjustment."

On July 23, 1993, the ITA filed with this Court its Final Results of Redetermination Pursuant to Court Remand, *The Torrington Company v. United States* Slip Op. 93–103 (June 9, 1993) *("Remand Results").* In its Remand Results, the ITA added to foreign market value ("FMV") the amount of value added tax ("VAT") paid on sales of the subject merchandise in the home market without adjustment and also added the exact same amount to United States price ("USP"). *Remand Results* at 2–5.

DISCUSSION

ITA's final results filed pursuant to a remand will be sustained unless that determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938); *Alhambra Foundry Co. v. United States,* 12 CIT 343, 345, 685 F. Supp. 1252. 1255 (1988).

Torrington and Federal-Mogul challenge the ITA's treatment of the United Kingdom's VAT on remand. *Memorandum of The Torrington Company in Support of its Motion for a Remand ("Torrington's Memorandum")* at 2–7; *Comments of Federal-Mogul Corporation, Plaintiff-Intervenor, Concerning Defendant's Final Results of Redetermination Pursuant to Court Remand ("Federal-Mogul's Comments")* at 4–20.

In its Remand Results, as instructed by this Court, the ITA added the amount of VAT paid on each sale in the home market without making a circumstance of sale ("COS") adjustment to this amount. In addition and on its own initiative, the ITA added the exact same amount to USP instead of following its usual practice of applying the *ad valorem* VAT rate to the net USP after all adjustments had been made and adding this amount to USP. *Remand Results* at 2–5; *see Issues Appendix,* 56 Fed. Reg. at 31,729. ITA's rationale for its new approach is based on its inter-

pretation of the United States Court of Appeals for the Federal Circuit's recent opinion on the VAT issue in *Zenith Elecs. Corp. v. United States*, 988 F.2d 1573, 1580–82 (1993). *Remand Results* at 2. ITA implemented its stated methodology and recalculated margins only for respondents who did not participate in the Second Administrative Review because the ITA's new methodology only changes cash deposit rates which are still in effect only for these respondents. *Id.* at 4–5.

Defendant argues that the ITA's new VAT methodology is responsive to this Court's remand order. Specifically, the defendant argues that this new methodology adds the full amount of VAT to FMV and does not make a COS adjustment to the amount of VAT added to FMV. *Remand Results* at 2–3; *Defendant's Opposition to Motion of The Torrington Company for a Remand ("Defendant's Opposition")* at 3; *Defendant's Rebuttal to the Comments of Federal-Mogul Corporation Concerning Defendant's Final Results of Redetermination Pursuant to Court Remand ("Defendant's Rebuttal")* at 4.

In addition, defendant argues that the ITA's new methodology is in accord with *Zenith*, 988 F.2d at 1580–82. The court in *Zenith* held that the ITA was not allowed to make a COS adjustment to FMV to achieve tax neutrality by eliminating the so-called multiplier effect of 19 U.S.C. § 1677a(d)(1)(C) (1988).[1] The court reasoned that 19 U.S.C. § 1677a(d)(1)(C) is the sole provision of the antidumping duty statute that deals with the treatment of VATs. As a result, 19 U.S.C. § 1677b(a)(4)(B) (1988), which allows adjustments to FMV for differences in circumstances of sale, does not apply and cannot be used to achieve tax neutrality. *Zenith*, 988 F.2d at 1580–82.

The court also stated that:

> By engaging in dumping, the exporters themselves are responsible for the multiplier effect. The multiplier effect does not create a dumping margin where one does not already exist. Only when pre-tax FMV exceeds USP and a foreign nation assesses an ad valorem domestic commodity tax does section 1677a(d)(1)(C) operate to ac-

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[1] 19 U.S.C. § 1677a(d)(1)(C) states:

> **(d) Adjustments to purchase price and exporter's sales price**
> The purchase price and the exporter's sales price shall be adjusted by being–
> (1) increased by–
> * * * * * * *
> (C) the amount of any taxes imposed in the country of exportation directly upon the exported merchandise or components thereof, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States, but only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation; * * *.

The multiplier effect can be seen in the following example taken from *Zenith-Elecs. Corp. v. United States*, 10 CIT 268, 273 n.9, 633 F. Supp. 1382, 1386 n.9 (1986), *appeal dismissed*, 875 F.2d 291 (Fed. Cir. 1989):

> Suppose the pre-tax home market price for a certain model of Japanese television is equal to $100, while the purchase price for the same model when sold for export to the United States is $90. In this tax-free comparison, the absolute margin of dumping would be $10 ($100–$90) and the *ad valorem* margin would be 11.1% ($10/$90).
> Since the Japanese commodity tax is 15%, the tax on the home market sale equals $15 (15% of $100). If we assume that this tax is fully shifted forward to the home market purchaser, then the after-tax home market price equals $115. By contrast, the amount of tax rebated or not collected on the exported television because it was sold for export would equal only $13.50 (15% of $90). Hence, if the United States price were increased by this latter amount, in accordance with the terms of 19 U.S.C. § 1677a(d)(1)(C), the adjusted calculation of USP would be $103.50 ($90 + $13.50). The absolute margin, determined by subtracting the adjusted USP from the after-tax home market price, would be $11.50 ($115–$103.50), an amount greater than the $10 absolute margin calculated in the tax-free comparison, above. The *ad valorem* margin, however, would be identical, at 11.1% ($11.50/$103.50).

> centuate the dumping margin. Without a dumping margin (when pretax FMV equals [or is less than] USP), even assessment of an *ad valorem* tax creates no multiplier effect. The multiplier effect thus occurs only when a dumping margin already exists. If a foreign manufacturer does not export its wares at less than fair value, it will not suffer disadvantage from the operation of section 1677a(d)(1)(C).
>
> Moreover, the enactment history of section 1677a(d)(1)(C) does not suggest that Congress sought tax ,neutrality when it fashioned the adjustment provision.

Zenith, 988 F.2d at 1581–82. It is clear from this statement that tax neutrality is irrelevant to the proper application of 19 U.S.C. § 1677a(d)(1)(C). *See also Federal-Mogul Corp. v. United States*, 17 CIT ___, ___, 813 F. Supp. 856, 864–65 (1993).

Defendant argues that the court in *Zenith* only decided that the ITA could not make a COS adjustment to FMV to obtain tax neutrality. Defendant argues that the court's decision does not mean that the ITA cannot adopt an interpretation of the statute which would result in tax neutrality. Defendant states that its position is affirmed by footnote 4 in *Zenith* which states:

> The statute by its express terms allows adjustment of USP in the *amount* of taxes on the merchandise sold in the country of exportation. While perhaps cumbersome, Commerce may eliminate the multiplier effect by adjusting USP by the amount, instead of the rate, of the *ad valorem* tax.

988 F.2d at 1582 n.4 (emphasis in original); *Defendant's Opposition* at 3–5; *Defendant's Rebuttal* at 4–5, 7–9.

Defendant argues that there are two valid interpretations of the statutory language in regard "to whether the tax to be added to USP is (1) the tax that would have been charged on the exported merchandise, had the foreign country taxed exports; or (2) the tax that would have been charged on the exported merchandise, had it been sold in the foreign market." *Defendant's Opposition* at 6; *Defendant's Rebuttal* at 6–7. ITA has chosen the second interpretation and defendant argues that this interpretation is entitled to substantial deference citing *Chevron v. Natural Resources Def. Council*, 467 U.S. 837 (1984). *Defendant's Opposition* at 6; *Defendant's Rebuttal* at 7.

SKF USA Inc. and SKF (U.K.) Limited ("SKF") agree with the ITA's treatment of the United Kingdom's VAT on remand and support the defendant's arguments on this issue. *Comments of SKF Regarding Final Remand Results ("SKF's Comments")* at 1–2 and attachment.

In addition, SKF argues that the ITA should be required to recalculate margins for all reviewed respondents because it is possible that the ITA may use uncorrected cash deposit rates from the First Administrative Review as best information available ("BIA") in subsequent proceedings. *Id.* at 3–4.

Torrington and Federal-Mogul argue that footnote 4 in *Zenith* is merely dicta and not the holding of the Court of Appeals on this issue.

Torrington's Memorandum at 5–7; *Federal-Mogul's* Comments at 12–16.

In addition, Torrington argues that footnote 4 is an inaccurate statement of the law. Torrington argues that 19 U.S.C. § 1677a(d)(1)(C) states that "the amount of any taxes imposed in the country of exportation directly upon the *exported merchandise* * * * which have been rebated or which have not been collected, by reason of the exportation * * *" must be added to USP. *Torrington's Memorandum* at 6 (emphasis in original). Nowhere does the statute discuss using the amount of tax paid on home market sales.

Federal-Mogul also points out that, until now, the ITA has consistently interpreted the statute to require the application of the *ad valorem* VAT rate to net USP to derive the amount that is added to USP. Federal-Mogul states:

> First, Commerce never adjusts USP by a rate of an *ad valorem* tax. It adjusts USP by an *amount* of tax – an amount which is arrived at by applying a rate to a tax base. The *amount* of tax used in the adjustment to USP has been the statutory amount of tax forgiven on exportation.

Federal-Mogul's Comments at 14 (emphasis in original).

This Court remanded this issue for the ITA "to add the full amount of VAT paid on each sale in the home market to FMV without adjustment." *Torrington,* 17 CIT at ____, 824 F. Supp. at 1101. Nowhere did this Court discuss changing the ITA's method of adding an amount to USP pursuant to 19 U.S.C. § 1677a(d)(1)(C) to account for the United Kingdom's VAT. In fact, this Court implicitly affirmed the ITA's methodology for adjusting USP in its discussion of the tax base issue in *Federal-Mogul,* 17 CIT at ____, 813 F. Supp. at 865–66.

Defendant relies on *Zenith* to support its position. Although the ITA's Remand Results do not explicitly cite to footnote 4, this is the ITA's primary support for its mistaken belief that its new VAT methodology is not in conflict with the body of the *Zenith* opinion and the language of the statute. *Defendant's Opposition* at 3–9; *Defendant's Rebuttal* at 5–9. However, this Court finds that footnote 4 is clearly at odds with the body of *Zenith* and the language of the statute and is dicta.

The court in *Zenith* states that "[t]itle 19 explicitly requires Commerce to increase USP by the amount of tax that the exporting country *would have assessed on the merchandise if it had been sold in the home market.*" 988 F.2d at 1580 (emphasis added). It is clear from this statement, as well as the language of the statute itself, that the sale price to which the VAT rate is to be applied is the USP calculated at the same point in the chain of commerce where the United Kingdom's tax authorities apply the United Kingdom's VAT to home market sales. For example, if when taxing home market sales, the United Kingdom's tax authorities apply the United Kingdom's VAT rate to an ex-factory price to calculate the amount of tax due, the ITA is required to apply the

United Kingdom's VAT rate to an ex-factory USP and add the resulting amount to USP. 19 U.S.C. § 1677a(d)(1)(C).

Support for this position is provided by the Court of Appeals for the Federal Circuit's recent decision on the tax base issue in *Daewoo Elecs. Co. v. United States*, Nos. 92–1558, –1559, –1560, –1561, –1562 (Fed. Cir. Sept. 30, 1993). The court in *Daewoo* stated that 19 U.S.C. 1677a(d)(1)(C)

> mandates a calculation of imputed tax amounts to be added to the USP, *but does not specify to which USP the Korean taxes are to be applied as the product moves to the consumer*. This determination is important because the Korean taxes are not a specific amount, but instead ad valorem in nature; and it is difficult because the question is a hypothetical. *The Korean taxes must be applied to sales of goods at some discrete moment in the stream of commerce with or in the United States, a different market from that in which the taxes should be levied, but are not, because of exportation.*

Daewoo, Nos. 92–1558, –1559, –1560, –1561, –1562 at 18–19 (emphasis added). In the *Daewoo* case, the ITA determined that evidence on the administrative record showed that the Korean tax authorities applied their *ad valorem* taxes to "the net price of the delivered television receivers to unrelated dealers." *Id.* at 19. Therefore, the ITA applied the Korean tax rate to the comparable USP, *i.e.*, the price to the first unrelated purchaser. *Id.* at 19–20. The court went on to affirm the ITA's methodology of determining where in the stream of commerce the Korean authorities applied the *ad valorem* tax rate in the home market and applying the same tax rate to USP calculated at the same point in the chain of commerce and adding this amount to USP. *Id.* at 18–22.

Therefore, since as a matter of law the ITA has incorrectly adjusted USP for the United Kingdom's VAT, and since there is no just reason for delay in the entry of final judgment on this issue, this Court is entering final judgment on this issue ordering the ITA to apply the United Kingdom's VAT rate to USP calculated at the same point in the stream of commerce where the United Kingdom's tax authorities apply the United Kingdom's VAT rate to home market sales and add the resulting amount to USP. Furthermore, the ITA is required to recalculate margins for all respondents because these margins may be used as BIA in subsequent proceedings.

(Slip Op. 93–200)

ALLIED-SIGNAL AEROSPACE CO., GARRETT ENGINE DIV., AND GARRETT AUXILIARY POWER DIV., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND TORRINGTON CO., DEFENDANT-INTERVENOR, AND FEDERAL-MOGUL CORP., DEFENDANT-INTERVENOR

Court No. 91–08–00571

Plaintiff contests the remand results of the Department of Commerce, International Trade Administration ("Commerce"), in this case, claiming that they were unsupported by substantial evidence and not in accordance with law.

Held: Commerce acted in accordance with law and the remand results are hereby affirmed.

[Remand results affirmed; case dismissed.]

(Dated October 14, 1993)

Adduci, Mastriani, Schaumberg & Schill (Louis S. Mastriani, and *Gregory C. Anthes)* for plaintiff.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Velta A. Melnbrencis* and *Michael S. Kane);* of counsel: *John D. McInerney,* Acting Deputy Chief Counsel for Import Administration, *Thomas H. Fine,* and *Craig R. Giesze,* Attorney-Advisors, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., Wesley K. Caine, Myron A. Brilliant and *Robert A. Weaver)* far The Torrington Company.

Frederick L. Ikenson, P.C. (Frederick L. Ikenson, J. Eric Nissley, Larry Hampel and *Joseph A. Perna, V)* for Federal-Mogul Corporation.

OPINION

TSOUCALAS, *Judge:* Plaintiff, Allied-Signal Aerospace Company, Garrett Engine Division and Garrett Auxiliary Power Division ("Allied-Signal"), contest the remand results of the Department of Commerce, International Trade Administration ("Commerce"), in this case, claiming that they were unsupported by substantial evidence and not in accordance with law.

Allied Signal is an importer of bearings manufactured by SNFA Bearings, Ltd. ("SNFA"). In May 1989, Commerce published *Final Determinations of Sales at Less Than Fair Value: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France ("LTFV determination"),* 54 Fed. Reg. 19,092 (1989). In this less than fair value ("LTFV") determination, Commerce assigned antidumping duty margins to French companies that exported antifriction bearings including SNFA.[1]

In the final results of the administrative review at issue, Commerce resorted to best information available ("BIA") and selected the highest dumping margins of any company from the LTFV determination. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany; Final Results of*

[1] *Id.* at 19,096. The ITA did not calculate a company-specific rate for SNFA; it assigned to SNFA's bearings the "all others" rate. *Id.*

Antidumping Duty Administrative Review, 56 Fed. Reg. 31,692, 31,705 (1991). On September 17, 1992, the Court of International Trade affirmed this determination. *Allied-Signal Aerospace Co. v. United States,* 16 CIT ____, 802 F. Supp. 463 (1992).

On June 22, 1993, the United States Court of Appeals for the Federal Circuit affirmed Commerce's use of a two-tier BIA methodology, but reversed the judgment of the Court of International Trade and stated that Commerce should have utilized the second tier. *See Allied-Signal Aerospace Co. v. United States,* 996 F.2d 1185 (Fed. Cir. 1993). The Federal Circuit instructed Commerce to utilize the second tier of its BIA methodology stating that the ITA assigns to a respondent the higher of its own prior LTFV rate or the highest rate calculated in the current administrative review. *Id.* at 1193. On July 27, 1993, in accordance with the Federal Circuit's instructions, this Court issued an order remanding the case to Commerce to recalculate the dumping margins at issue under the second tier of Commerce's two-tier BIA methodology. *Allied-Signal Aerospace Co. v. United States,* 17 CIT ____, Slip Op. 93–140 (July 27, 1993).

On September 1, 1993, Commerce completed its remand results with the revised dumping margins for SNFA using as BIA the "all others" rate from the LTFV investigation. *See Final Results of Redetermination Pursuant to Court Remand* at 2.

Plaintiff now claims that Commerce's remand results are not in accordance with the Federal Circuit's opinion because Commerce did not use the respondent's own rate from the LTFV determination and, furthermore, that Commerce's remand results are not in accordance with law or supported by substantial evidence. *Memorandum of Plaintiff in Opposition to Final Results of the Department of Commerce's September 2, 1993 Remand Redetermination* at 2. Plaintiff moved for oral argument on this issue which was opposed by defendant and defendant-intervenors. On October 12, 1993, the Court denied plaintiff's motion for oral argument on the grounds that oral argument was unnecessary.

The second tier of Commerce's BIA methodology is used for companies that "substantially cooperated with our [Commerce's] requests for information * * * but failed to provide the information requested in a timely manner or in the form required." It is calculated by taking

> the higher of: (1) the firm's LTFV rate for the subject merchandise *(or the "all-others" rate from the LTFV investigation if the firm was not individually investigated),* or (2) the highest calculated rate in this review for the class or kind of merchandise from the same country of origin.

Allied-Signal, 996 F.2d at 1188 (emphasis added).

In this case, SNFA was not individually investigated during the LTFV investigation. Therefore, Commerce selected from the highest of the "all others" rate from the LTFV investigation or the highest calculated rate in the review. Plaintiff claims that the "all others" rate is inappropriate since the Federal Circuit specifically stated that Commerce is to

look at the respondent's *own* LTFV rate. What plaintiff is overlooking, however, is that in the absence of a respondent's own rate, the "all others" rate is the rate that applies to the respondent. Therefore, this Court affirms Commerce's remand determination and this case is hereby dismissed.

(Slip Op. 93–201)

UNITED STATES, PLAINTIFF *v.* JAC NATORI CO., LTD., DEFENDANT

Court No. 90–08–00445

[Cross-motions to compel discovery granted in part and denied in part.]

(Dated October 14, 1993)

Frank W. Hunger, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Marc E. Montalbine);* and Office of Regional Counsel, U.S. Customs Service *(I. David Krawet)*, of counsel, for the plaintiff.

Irving A. Mandel for the defendant.

MEMORANDUM AND ORDER

AQUILINO, *Judge:* In denying defendant's motion to dismiss this action brought by the government pursuant to 28 U.S.C. § 1582 to recover penalties and duties under 19 U.S.C. § 1592, this court ordered the defendant to answer the complaint and that discovery be completed. *See* Slip Op. 93–70, 17 CIT ___, 821 F.Supp. 1514 (May 12, 1993), familiarity with which is presumed.

I

The first part of that mandate has been met but not the second. Rather, as the deadline for discovery drew near, the plaintiff interposed a motion to compel answers to its interrogatories and a motion to extend that deadline until 180 days after disposition of the first motion. Appendix B to the motion to compel contains some 70 written interrogatories propounded to the defendant along with what appear to be dozens of photocopies of business records. By plaintiff's reckoning, the defendant has answered interrogatories 1, 2, 3, 50, 61(b) and 70; all of the others have not been responded to in an acceptable manner.[1]

Indeed, Defendant's Response to Plaintiff's First Set of Interrogatories dated June 24, 1993 asserts the following "general objections" to them, among others:

> 1. * * * [T]hey are overly broad, unduly burdensome, vague, confusing, argumentative, repetitive, duplicative of prior requests for

[1] *See* plaintiff's Motion to Compel, Appendix A (Table of Responses Provided by Natori to Plaintiff's First Set of Interrogatories).

> production of documents, not reasonably calculated to lead to the discovery of relevant information or admissible evidence, and/or request that defendant make or accept legal conclusions or arguments.
>
> 2. * * * [T]hey call for information, documents, or responses that are exempt from production as attorney work product, or are protected by the attorney-client privilege or any other privilege or exemption provided by law.
>
> * * * * * * *
>
> 4. * * * [T]hey seek information that a judge of a federal district court has already ordered that plaintiff may not obtain from defendant. Sprizzo J., *U.S. v. Jac Natori, Inc.*, M–18–306 (S.D.N.Y. 1988).[2]

Now in its response to plaintiff's motion to compel, the defendant supplements the foregoing objections with argumentation that it has already "provided all information and pertinent records and documents in its possession during the administrative phase of the proceeding, the district court summons enforcement proceeding, and this de novo stage of the penalty proceeding"[3]; that "Customs auditors and special agents have repeatedly accused Natori of engaging in criminal conduct, including on-going allegations of concealing or destroying requested documentation" and thus it "and/or its representatives are faced with a real and appreciable threat of criminal prosecution, requiring them to invoke their Fifth Amendment privileges against self-incrimination"[4]; and that "the government is now collaterally estopped from re-arguing the issues long since determined by the district court."[5] In addition, the defendant asserts specific objections to specified interrogatories.

In response to plaintiff's concomitant motion to extend the deadline for discovery, the defendant contends that the plaintiff itself has failed to afford discovery and "seemingly is attempting to tie its lack of response to these discovery requests with its motion to compel, claiming that somehow defendant has an unfair advantage.[6] The defendant requests that the plaintiff be ordered to afford discovery in the form of answers to written interrogatories and production of documents and witnesses for deposition.

II

According to Appendix A to plaintiff's motion to compel, the defendant asserts a Fifth Amendment privilege in objection to interrogatories 4–6 (regarding the identity of Natori shareholders, its officers and their duties); 13–14 (regarding any relationship between Natori shareholders and those of FF International Mfg. Corp. ("FFI")); 16–22 (regarding the business practices of Natori during the period 1980 and 1985); 25–26

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[2] Plaintiff's Motion to Compel, Appendix C, pp. 1–2.

[3] Defendant's Response in Opposition to Plaintiff's Motion to Compel, pp. 1–2.

[4] *Id.* at 2.

[5] *Id.* at 15.

[6] Defendant's Opposition to Plaintiff's Motion to Stay Further Discovery and Extend the Discovery Cut-Off Date, p. 2.

(regarding the officers responsible for disbursing moneys and the manner in which they were paid and whether and how they could draw moneys from accounts); 29–32 (regarding whether Natori made payments to a specified bank account and the reasons for them); 33–35 (regarding the identity of persons who set up Natori's accounting system and maintained it); 36–38 (regarding the manner in which the corporation's ledgers were maintained); 42 (regarding recordation of certain accounts payable); 43–44 (regarding the identity of source documents and the accounting firm which examined Natori's books and records); 45–53 (regarding certain year-end-adjustment entries); 54 (regarding merchandise and materials purchased but not recorded in the books and records); 55 (regarding certain proper names); 57–60 (regarding the procedures used in submitting consumption-entry paperwork); 61(c) (regarding the cost of components of the merchandise); 61(g) (regarding the manner in which Natori paid for the merchandise); 62 (regarding the identity of Natori officers, employees or agents involved in decisions on prices, charges and values reported to Customs); and 64–66 (regarding the actual nature and legal consequences of the five entries at issue herein). That is, these questions have given rise to the following, repeated response:

> Defendant and its representatives respectfully decline to answer * * * on the ground that the answer may tend to incriminate them. Defendant is unable to appoint an agent who, without fear of self-incrimination, could furnish such requested information as may be available to it. *U.S. v. Kordel*, 397 U.S. 1, 7–10 * * * (1970). See *In re: Corrugated Container Antitrust Litigation*, 662 F.2d 875, 882–883 (1981).[7]

Of course, now in response to plaintiff's motion to compel, the defendant admits, as it must, that the privilege against self-incrimination does not attach to corporations[8], nor, for that matter, may a custodian of corporate books or records withhold them on the ground that he personally might be incriminated by their production.[9] Moreover, it has been held that the Fifth Amendment testimonial privilege does not apply to an action like this one brought pursuant to 19 U.S.C. § 1592. *See United States v. Gordon*, 10 CIT 292, 634 F.Supp. 409 (1986).[10]

On the other hand, the court stated in *Gordon* that "the threat of future criminal prosecution may justify assertion of the fifth amendment privilege against self-incrimination even in a strictly civil proceeding."

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[7] Plaintiff's Motion to Compel, Appendix C *passim*.

[8] *See, e.g., California Bankers Assn. v. Shultz*, 416 U.S. 21, 55 (1974).

[9] *See, e.g., Curcio v. United States*, 354 U.S. 118, 122 (1957). The court notes in passing that Appendix C to plaintiff's motion to compel contains copies of documents apparently produced by the defendant.

[10] The plaintiff attempts to rely on this case for the proposition that the privilege has not been properly asserted. This attempt misses the mark. The nature and extent of defendant's objection are readily discernible from the papers at hand. *See Hoffman v. United States*, 341 U.S. 479, 486–87 (1951).

10 CIT at 296, 634 F.Supp. at 414, citing *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973). The plaintiff asserts, however, that

> [n]either Natori nor any of its representatives have been indi[c]ted for crimes arising from the entries involved in this action. Moreover, the Government's interrogatories deal only with the period of time from 1980 through 1985. The five-year statute of limitations for violations of the customs laws committed during this period has already expired. *See* 18 U.S.C. § 3283. Accordingly, Natori and its representatives face no real and appreciable threat of criminal prosecution.

Motion to Compel, p. 6.

On its part, the defendant denies that the statute of limitations bars an action against it for violation of 18 U.S.C. § 551[11] and maintains that "on at least three separate occasions government officers responsible for the investigation and prosecution of this case have pointedly accused Natori of engaging in fraudulent conduct and of concealing information and/or destroying import-related documents." Defendant's Response in Opposition to Plaintiff's Motion to Compel, p. 8. An affirmation of defendant's counsel appended to this response states:

> * * * 2. During the course of the now eight year Customs investigation underlying this penalty proceeding, I have encountered several instances of criminal allegations being levied against Natori by various government officers responsible for this action.
>
> 3. On or about May 22, 1986, while meeting with Customs Special Agent Stephen Yagoda, Mr. Yagoda pointedly remarked that Natori had engaged in fraudulent conduct and that my law firm should get a higher class of clients * * *.
>
> 4. On or about January 9, 1987 I received a telephone call from Customs Auditors Eugene Donohue and Robert Perri regarding the ongoing audit of Natori's books and records. During that telephone call, the government auditors pointedly demanded an interview with Natori's accounting personnel for the clearly expressed purpose of establishing whether documents they believed were relevant to the audit had been destroyed by Natori.
>
> 5. On or about February 11, 1987 I was served on behalf of Natori with an undated administrative summons demanding, among other things, testimony stating that "where an identified document has been destroyed or alleged to have been destroyed, state the date and reason for its destruction, identify each person having any knowledge of its destruction, and each person responsible for its destruction".
>
> 6. On or about May 11, 1987 I met with Customs Special Agent Charles H. Geier and during the course of that meeting Mr. Geier pointedly demanded that I advise Natori not to destroy any documents.

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[11] This section of the code imposes criminal responsibility on:

> Whoever willfully conceals or destroys any invoice, book, or paper elating to any merchandise imported into the United States, after an inspection thereof has been demanded by the collector of any collection district; or
>
> Whoever conceals or destroys at any time any such invoice, book, or paper for the purpose of suppressing any evidence of fraud therein contained * * *.

The defendant further argues that the statute of limitations does not bar the government from pursuing a criminal action against it and its representatives for entries made less than five years ago or for conspiring to commit import fraud with regard to entries made earlier because an act in furtherance of such conspiracy, like destruction of documents, starts the running of the period of limitation anew.

As indicated above, the defendant attempts to rely on *In re Corrugated Container Antitrust Litigation*, 662 F.2d 875, 886 (D.C. Cir. 1981), stating that the

> statute of limitations begins to run for an individual defendant involved in a continuing conspiracy from the conclusion of the conspiracy unless an individual can show that he withdrew from the conspiracy by an affirmative act designed to defeat the purpose of the conspiracy.

However, in that litigation, the person asserting the privilege against self-incrimination was found to still be within the period of limitation at the time of his deposition and therefore clearly had reasonable cause to fear prosecution for his answers. That is, in January 1978 a federal grand jury in Houston, Texas had indicted companies and individuals for an alleged nationwide conspiracy to fix prices in the corrugated container industry. While the grand jury investigation and the subsequent criminal trial were in progress, purchasers of corrugated products filed class and non-class actions in various U.S. district courts. And in the course of discovery in those actions, the plaintiffs noticed the deposition in question for April 3, 1981. The court of appeals explained that the

> six questions that appellant refused to answer relate to potentially incriminating matter because they concern alleged exchanges by appellant of price information with competitors in the corrugated container industry, and they might reveal his participation from 1968–75, while he worked with Weyerhaeuser and CORCO, in an alleged ongoing price-fixing conspiracy that purportedly continued until 1978.

Id. at 883. The court could not agree with the district judge that the likelihood of prosecution was "fanciful at most" even though the criminal trial had finished because there was no certainty at that time that a second criminal action could not and would not be brought. *See id.* at 884–85.

In the action at bar, the defendant takes the position that the government's allegations imply that

> Natori is involved in a pervasive fraud to conceal imports, reduce dutiable value and otherwise fraudulently produce or alter massive amounts of documents, books and records. In effect, the government is claiming that this importer's way of doing business is itself criminal, and that books and records have been altered or destroyed in order to conceal the financial consequences of Natori's alleged

> acts. If these allegations are true then the implications of these alleged acts go well beyond the boundaries of this case and porten[d] serious liabilities for the parties involved.

Defendant's Response in Opposition to Plaintiff's Motion to Compel, pp. 9–10. Hence, the defendant argues that its representatives are faced with a real and appreciable threat of criminal prosecution.

If this is an accurate perception of self on the part of the defendant, as opposed to fanciful argumentation by its attorney, everything that is now before this court on plaintiff's motion to compel points well to the past, be they the subject entries or the threats alleged to have been made by Customs agents or the proceedings which have set this stage for the parties' discovery.[12] In short, not only has the defendant failed to persuade this court that its constitutional concern is not within the realm of speculation, the court is also not convinced that questions which the plaintiff is asking call for answers even arguably tending to incriminate. To quote some of the interrogatories at issue:

> 4. Identify all shareholders of Natori, indicating the number of shares owned by each shareholder.
>
> 13. State whether any shareholders of Natori are related to any shareholders of FFI.
>
> 18. Identify those officers or employees of Natori who were responsible for ordering, purchasing, receiving, inventorying, and paying for (identify the person who did what) ladies' wearing apparel manufactured by FFI during the period 1980 through 1985.
>
> 25. Identify those officers or employees of Natori who were responsible for disbursing moneys on behalf of Natori during the period 1980 through 1985.
>
> 32. State whether any of the payments made to the "Jazfel" bank account were made on behalf of FFI and identify the payments which were so made.
>
> 33. Identify the person who set up Natori's accounting system, books, and records.
>
> 37. Explain the manner in which Natori's accounts payable ledgers were maintained for 1981 and 1982, including the meaning of the columns headed "L.C.", "Actual," and "Bal." and the items that were recorded in the various columns * * *.
>
> 42. State whether the prices actually payable to FFI for ladies wearing apparel manufactured by FFI were recorded during 1981 and 1982 in the column headed "Actual" in Natori's accounts payable ledgers.
>
> 44. Identify the accounting firm that examined Natori's books and records for 1981 and 1982 and the person working for the accounting firm who examined Natori's books and records for 1981 and 1982.

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[12] The court notes in passing that the nature of unlawful entry of merchandise and the difficulty and therefore the timing of its discovery have often led first to criminal prosecution before assertion of claims for penalties under 19 U.S.C. § 1592. *See, e.g., United States v. Dantzler Lumber & Export Company*, 16 CIT ___, 810 F.Supp. 1277 (1992), and cases cited therein.

> 55. State whether Natori, its shareholders, officers, or employees contracted with, or hired or employed persons with names such as, or similar to, "Carmen," "Sunshine Cutters," and/or "Trade-East", during the period 1980 through 1982.

III

As also indicated above, the defendant attempts to rely on what amounts to a law-of-the-case objection. For example, in addition to raising a claim of testimonial privilege to the foregoing interrogatory 18, defendant's response thereto, as well as to interrogatories 16, 19, 20–22, 25, 26, 29–38, 40–44, 46–48, 51–55, 57–60, 61(c), 61(g), and 62–65, states:

> Pursuant to the Order of the Hon. John E. Sprizzo in *U.S. v. Jac Natori, Inc.*, M–18–306 (S.D.N.Y. 1988), the law of this case is that plaintiff is not entitled to compel from defendant's representative 1) an explanation of documents previously supplied in the course of the penalty investigation or 2) an assertion that the representative has a connection with the corporation of which the government does not know * * *.[13]

That court proceeding grew out of an attempt by the government to compel Natori to turn over documents and give testimony regarding alleged concealment or destruction of records which Customs suspected had not been produced. The district judge ordered production of documentation but excused Natori representatives from giving testimony.

The plaintiff now argues that law-of-the-case governs subsequent stages of the same matter, citing *Arizona v. California*, 460 U.S. 605, 618 (1983), and *Ashdown, U.S.A., Inc. v. United States*, 12 CIT 808, 810 n. 1, 696 F.Supp. 661, 664 n. 1 (1988) ("law of the case applies only to prior rulings involved in the same on-going case in which the ruling was made").

Of course, it can be also argued that the matter which led the government to seek relief in the district court is also what leads it to this Court of International Trade now. But the Supreme Court has characterized the doctrine the defendant presses as a "discretionary rule of practice." *United States v. U.S. Smelting Refining & Mining Co.*, 339 U.S. 186, 199 (1950). And in *Arizona v. California*, the Court stated that the doctrine "directs a court's discretion it does not limit the tribunal's power." 460 U.S. at 618, citing *Southern R. Co. v. Clift*, 260 U.S. 316, 319 (1922), and *Messiinger v. Anderson*, 225 U.S. 436, 444 (1912). In short, whatever law developed in the S.D.N.Y. miscellaneous matter 18–306 on June 21, 1988[14] does not provide the defendant with a universal basis for denying discovery herein. In fact, the district judge closed the colloquy on that date with a remark that his court was not the place in which to seek appropriate relief.[15]

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[13] Plaintiff's Motion to Compel, Appendix C, p. 7, para. 18.

[14] *See generally* Exhibit 2 to Appendix C to plaintiff's Motion to Compel.

[15] *See Id.* at 20.

IV

The defendant has objected to interrogatories 7–12, 15, 23, 24, 40, 41, 61(a) and 61(h) on the ground that

> it is not required to engage in research and compilation when the purpose of the effort is to assist plaintiff in the preparation of its case. *H[a]lder v. Intern. Tel. & Tel. Co.*, 75 F.R.D. 657, 658 (E.D.N.Y. 197[7]); *United Cigar-Whalen Stores Corp. v. Phillip Morris, Inc.*, 21 F.R.D. 107, 109 (S.D.N.Y. 1957).

In *Halder*, the court noted that "where the data is available to plaintiff, either by consent of defendant (as is the case here) or by means of the appropriate discovery motion, this party should assume the burden of locating and assimilating the information he desires." 75 F.R.D. at 658, citing *H.K. Porter Co. v. Bremer*, 12 F.R.D. 187 (N.D. Ohio 1951). The court also cited *DaSilva v. Moore-McCormack Lines, Inc.*, 47 F.R.D. 364 (E.D. Pa. 1969), stating that "it is necessary to balance the burden which answering these interrogatories would place on defendant, against the value of the answers to plaintiff's case." 75 F.R.D. at 658. In *United Cigar*, the court decided not to compel the defendant to respond to interrogatories regarding its total sales and its advertising expenditures per the following reasoning:

> * * * Plaintiff does not deny that the information sought to be obtained by * * * interrogatory is equally available to it, but contends that it is nevertheless entitled to have the answers so that the issues on the trial may be narrowed. While interrogatories may certainly on many occasions effect the salutary purpose contended for by the plaintiff, I do not believe that discovery proceedings should be utilized to cast upon a defendant the burden of establishing the plaintiff's case when the plaintiff can at least as readily establish the requested facts.

21 F.R.D. at 109.

Here, the interrogatories to which the defendant objects as requiring it to do research are as follows:

> 7. State the year when Natori first imported merchandise produced abroad.
>
> 8. State the date and place of the incorporation of FF International Mfg. Corp. ("FFI").
>
> 9. Identify the incorporators of FFI.
>
> 10. Identify the shareholders of FFI.
>
> 11. Identify the major shareholders of FFI.
>
> 12. Identify the corporate officers of FFI from January 1, 1980 to date.
>
> 15. State the date when Natori commenced purchasing ladies' wearing apparel from FFI.
>
> 23. Identify all contractors, suppliers or other persons utilized by Natori during the period 1980 through 1985 in cutting materials and/or sewing or otherwise assembling components for ladies' wearing apparel (identify the persons who did what) for shipment to FFI.

24. Identify all contractors, suppliers or other persons utilized by Natori for cutting materials and sewing or otherwise assembling components for ladies' wearing apparel during the period 1980 through 1985.

40. State whether the entries listed in Exhibit A to the complaint are all the entries of ladies' wearing apparel imported by Natori during 1981 and 1982.

41. State whether the entries listed in Exhibit A to the complaint represent all merchandise imported by Natori during 1981 and 1982. If your answer is negative, identify the additional imports by entry numbers, dates of entry, and location of the Customs port through which the imports were entered.

61. For all the merchandise covered by the entries listed in Exhibit A to the complaint:

a. State the total payments made for the imported merchandise to the supplier by Natori;

* * * * * * *

h. State the price at which the merchandise was sold in the United States following importation[.]

As posited, none of these interrogatories appears to require the kind of preparation approaching that which a court could hold unduly burdensome or tending to directly aid the interrogator's case, nor has the defendant now attempted to show otherwise in its papers in opposition.

V

Nonetheless, plaintiff's interrogatories and motion to compel make recitation of the nature and scope of discovery according to CIT Rule 26(b)(1) necessary, to wit:

> In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

As indicated, the ultimate guidepost is and must be relevance. From this perspective, a number of plaintiff's requests appear to be lacking. For example, its complaint alleges in paragraph 5 that Natori purchased most of its wearing apparel from FFI, a Philippines company which was partially owned by Kenneth Natori's father-in-law, and in paragraph 15 that the defendant did not declare assists provided to FFI and did not reflect additional costs with respect to its purchases from FFI. In its answer, the defendant admits the essence of the allegations in paragraph 5 while denying those in 15. With issue thus joined, this court is unable to grasp the relevance of interrogatories 8–13, *supra,* and plaintiff's mo-

tion to compel as to them must therefore be denied. On the other hand, by way of comparison in regard to FFI, interrogatories 15, 18, 23 and 32, *supra,* could either result in answers directly admissible at trial or lead to such evidence, and plaintiff's motion as to them is therefore granted.

Reviewing all of the other interrogatories propounded by the plaintiff from the perspective of relevance to the issues joined, as the court is constrained to do, the motion to compel is denied as to those numbered 4, 14 and 26. Moreover, the court concludes that additional responses need not be ordered at this time to interrogatories 27, 28, 68 and 69.

VI

In thus granting the government's motion to compel answers to all of its interrogatories except those numbered 1–4, 814, 26–28, 50, 61(b) and 68–70, the court is reminded once again how ineffectual artful written interrogatories between counsel can be. Indeed, exchange of such questions by both sides in this action has led to their violation of the court's order of May 12, 1993 that discovery be completed.

If, as the defendant indicates in its papers, Customs has refused to date to grant any discovery, it has had no basis for doing so. To repeat, this kind of action does not commence on a clean slate. Administrative, if not criminal, proceedings ensue first, often spanning many years, which appears to be the chronology presented here. Then again, the requirement of CIT Rule 11 that a complaint not be drawn out of thin air, combined with the tradition that a party plaintiff has a primary and independent obligation to prosecute any action brought by it, from the moment of commencement to the moment of final resolution, imply that the plaintiff has and has had accumulated information subject to discovery. In short, the plaintiff is not at liberty in this action to deny discovery pending receipt of information through such process from the defendant. Defendant's request that the plaintiff be ordered to afford discovery at once in the form of answers to written interrogatories and production of documents and witnesses for deposition[16] must be, and it therefore hereby is, granted.

This grant of relief to the defendant, including written interrogatories, shall not be construed, however, as a license to obstruct further legitimate discovery in preparation for trial. Indeed, the record already supports imposition of sanctions within the ambit of CIT Rule 37 on both sides, but they shall await the deadline for all discovery, which is hereby extended until December 17, 1993. The parties are to present a proposed pretrial order to the court on or before December 30, 1993.

Trial will commence at 10 a.m. on Monday, January 10, 1994.

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[16]The court has just received another motion by the plaintiff, this one to stay the time to respond to requests for admissions apparently served by the defendant at the close of the period ordered by the court for discovery. This motion for a limited stay will be granted, in the interests of orderly procedure.

ABSTRACTED CLASSIFICATION DECISIONS

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C93/120 10/14/93 Carman, J.	UGG International, Inc.	91–01–00016	Not stated	Mens' sizes 10 or larger 6403.91.60 8.5% Mens' sizes smaller than 10 6403.91.90 10%	Slip Op. 93–16 (February 4, 1993)	Los Angeles UGG brand boots
C93/121 10/15/93 Tsoucalas, J.	Delco Electronics Corp.	92–05–00330	685.12 8.6%	685.32 6%	Agreed statement of facts	Chicago Circuit boards for motor vehicle radios

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